IN-STATE PLAINTIFF DIVERSITY JURISDICTION

HEARING

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

H.R. 4357 (Section 305)

FEDERAL COURTS IMPROVEMENT ACT OF 1994
(IN-STATE PLAINTIFF DIVERSITY JURISDICTION)

AND

H.R. 4446

IN-STATE PLAINTIFF DIVERSITY JURISDICTION

MAY 26, 1994

Serial No. 52

Printed for the use of the Committee on the Judiciary

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IN-STATE PLAINTIFF DIVERSITY JURISDICTION

THURSDAY, MAY 26, 1994

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:20 a.m., in room 2237, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Don Edwards, Carlos J. Moorhead, and Howard Coble.

Also present: Hayden Gregory, counsel; Edward O'Connell, assistant counsel; Veronica Eligan, secretary; and Joseph Wolfe, minority counsel.

OPENING STATEMENT OF CHAIRMAN HUGHES

Mr. HUGHES. The Subcommittee on Intellectual Property and Judicial Administration will come to order. Good morning and welcome to this morning's hearing on the issue of in-State plaintiff diversity jurisdiction. Diversity jurisdiction, generally, refers to the jurisdiction of the Federal courts to hear matters involving non-Federal law questions, when citizens of different States are opposing parties. Diversity jurisdiction is provided statutorily by 28 U.S.C. 1332. Both of the legislative proposals we will be discussing today, H.R. 4446 and section 305 of H.R. 4357, would reduce the basis for Federal court jurisdiction based solely on diversity of citizenship. It would not eliminate it entirely.

Both proposals would eliminate that portion of the diversity jurisdiction where a plaintiff is a citizen of the State in which he files the action in Federal court. Neither of these provisions would limit the applicability of removal by a defendant under 28 U.S.C. 1441(a). The difference between the proposals is that section 305 would eliminate diversity jurisdiction if any of the plaintiffs are citizens of the State in which the suit is filed and H.R. 4446 would eliminate it if all plaintiffs are citizens of the State in which the suit is filed.

Historically the implementation of diversity jurisdiction by legislation goes back to the First Congress which enacted the predecessor of 28 U.S.C. 1332. At that time, the Congress, and before them the draftees of the Constitution, had two fears about bias in litigation in the State courts. The first was the possibility of bias against out-of-State defendants who were litigants in State courts.

This initiated the right to removal by defendants. They also worried about a general bias in State courts against enforcement of debts. This triggered the right for an in-State plaintiff to file in Federal court.

Legislative efforts to reduce diversity jurisdiction in the Federal courts has come to the fore at various intervals in recent years. The Judicial Conference of the United States has long supported total abolition of diversity jurisdiction, as well as measures short of total elimination. In this Congress, the Conference is recommending section 305 of H.R. 4357, dealing with in-State plaintiffs suits, and section 101 of H.R. 4357, which would raise the jurisdictional minimum amount from $50,000 to $75,000 in diversity cases. Today we will concentrate on the in-State plaintiff issues.

I have previously distributed to the members of the subcommittee a 45-page paper submitted to the Judicial Conference by the Committee on Federal-State Jurisdiction which documents their rationale for eliminating in-State plaintiff diversity jurisdiction. Their conclusion was that, "The historic justification of in-State plaintiff jurisdiction has entirely evaporated." This combined with the growth of the Federal caseload which included 16,033 new in-State plaintiffs' diversity filings in 1992, suggests that we should seriously consider curtailing this form of diversity jurisdiction.

I will look forward to hearing the excellent witnesses we have before us this morning.

[The bills, H.R. 4357 (section 305) and H.R. 4446, follow:]

I

103D CONGRESS
2D SESSION

H. R. 4357

To make improvements in the operation and administration of the Federal courts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 5, 1994

Mr. HUGHES (for himself and Mr. MOORHEAD) (both by request) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To make improvements in the operation and administration of the Federal courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Courts Improvement Act of 1994".

SEC. 305. ELIMINATION OF IN-STATE PLAINTIFF IN DIVERSITY JURISDICTION CASES.

Section 1332 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(e) The original jurisdiction of the district courts otherwise conferred by this section may not be invoked if any plaintiff joined in the complaint is a citizen of the State in which is located the district court in which the suit is filed. For purposes of this subsection only, the District of Wyoming shall be deemed located solely within the State of Wyoming. This subsection does not apply to or limit the applicability of the right of removal under section 1441(a) of an action that would otherwise be within the original jurisdiction of the district courts.".

I

103D CONGRESS
2D SESSION

H. R. 4446

To amend section 1332 of title 28, United States Code, to require that the plaintiff in a diversity case not be a resident of the State in which the case is brought.

IN THE HOUSE OF REPRESENTATIVES

MAY 18, 1994

Mr. HUGHES introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend section 1332 of title 28, United States Code, to require that the plaintiff in a diversity case not be a resident of the State in which the case is brought.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1332 of title 28, United States Code is amended by adding at the end the following:

"(e) The original jurisdiction of the district courts otherwise conferred by this section may not be invoked if all plaintiffs joined in the complaint are citizens of the State in which is located the district court in which the suit is filed. For purposes of this subsection only—

"(1) the District of Wyoming shall be deemed to be located solely within the State of Wyoming; and

"(2) those portions of Yellowstone National Park situated in Montana shall be deemed to be located in the District of Montana; and

"(3) those portions of Yellowstone National Park situated in Idaho shall be deemed to be located in the District of Idaho.

This subsection does not apply to or limit the applicability of the right of removal under section 1441(a) of an action that would otherwise be within the original jurisdiction of the district courts.".

○

Mr. HUGHES. The Chair recognizes the distinguished gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Chairman. In a 1983 treatise titled, "Abolition of Diversity Jurisdiction, An Idea Whose Time Has Come," our former colleague on this subcommittee, M. Caldwell Butler of Virginia advocated the abolition of diversity jurisdiction while one of our distinguished witnesses today, John Frank, argued for its retention. In his article, Mr. Frank wrote that: "It is not time for friends of the diversity jurisdiction to be smug. We do have a conscientious duty to reexamine the situation. Federal filings are up."

I would submit that there is a greater need today to assess the need for diversity jurisdiction, given the strong trend in recent years in Congress to federalize State issues, especially in the criminal justice area, from making carjacking a Federal crime, to giving the Federal courts jurisdiction over fathers who slink on child support and then cross State lines.

Congress may be effectively shifting issues traditionally handled by the State courts to the Federal courts. President Clinton is scheduled to sign into law today legislation to make blocking abortion clinics a Federal crime. And as Judge Marcus knows, there are additional issues for the Federal courts in the omnibus crime bill that is awaiting conference.

Many of you know that Congressman Waxman now has a bill that has moved slightly, that would make it illegal to smoke in a publicly used building, and would give any member of the public the opportunity to bring charges in the Federal courts against the landlord of the building.

My point is that the landscape for the Federal judiciary is changing dramatically, and it is timely to consider the role of diversity jurisdiction in that context.

I commend the chairman for scheduling this hearing and look forward to the testimony of our distinguished witnesses.

Mr. EDWARDS [presiding]. Thank you very much, Mr. Moorhead.

Our first witness today is the Honorable Stanley Marcus who is a U.S. district judge for the Southern District of Florida.

Judge Marcus is also Chairman of the Committee on Federal-State Jurisdiction for the Judicial Conference of the United States and Chairman of the Ad Hoc Committee on Violence Against Women for the Judicial Conference. That committee has been of enormous help to us in writing that portion of the crime bill. We are very grateful, Judge Marcus.

Judge Marcus has had a remarkable and varied career, having served as the U.S. attorney for the Southern District of Florida, attorney in charge of the Department of Justice's strike force in Detroit, MI, and an assistant U.S. attorney for the Eastern District of New York. He also has been in the private practice of law in New York.

Judge Marcus, we are delighted to have you here. Your written statement will be made a part of the record, and you may proceed.

STATEMENT OF STANLEY MARCUS, JUDGE, SOUTHERN DISTRICT OF FLORIDA, AND CHAIRMAN, JUDICIAL CONFERENCE COMMITTEE ON FEDERAL-STATE JURISDICTION, AND CHAIRMAN, AD HOC COMMITTEE ON GENDER-BASED VIOLENCE

Judge MARCUS. Thank you very much Congressman Edwards, Mr. Chairman. I am privileged to be invited to be here today to share with the subcommittee some of the views of the Judicial Conference of the United States on this important subject.

I think this subcommittee and its members should be commended for conducting hearings on this subject. It could not be, from my perspective, more timely or more important to focus on the issues of jurisdiction in the broadest sense of the word.

In my view, we are at a crossroads in our history today. And I think the fundamental question facing the Congress and the people of the United States in this connection is to determine what kinds of cases it wishes to have heard in the Federal courts.

When we talk of jurisdiction, it is just a fancy way of really answering that question; what kinds of cases belong in the Federal courts, what kinds of cases belong in the State coordinated systems of justice?

The Constitution wisely commits to the judgment of Congress the task to decide the jurisdiction of the Federal courts. And these issues are particularly current and critical today, I think, as we witness very substantial expansion in the jurisdiction of the Federal courts, both in the civil area and in the criminal area. Areas that have been traditionally allocated to the State systems of justice, increasingly are being moved into the Federal system. And so, it comes, I think, at a particularly appropriate time in our history for this subcommittee to focus on this question.

The specific proposals at issue today: The one embodied in H.R. 4446 and the second in a suggestion made by the Judicial Conference, share the same basic principle, and that is that in-State plaintiff diversity jurisdiction generally no longer seems to be a necessary component of Federal court jurisdiction. Each of the two proposals, H.R. 4446 and the Conference proposal, would limit or repeal in-State plaintiff diversity jurisdiction.

A number of reasons, we submit, most respectfully, support this proposal to either eliminate or to curtail in-State plaintiff diversity jurisdiction. First, there appears to be no paramount Federal interest in the last decade of the 20th century in providing a Federal forum for enforcing rights created wholly by State law when the plaintiff is, indeed, a citizen of the State in which the suit is brought.

In the second place, the historic reasons which existed in 1789 for congressional establishment of in-State plaintiff diversity jurisdiction; namely, the fear of State court prejudice against creditors, no longer exists. I do not believe that it can be seriously contended today that an in-State plaintiff suffers the disability of the underenforcement of State-created rights in a State forum.

In the third place, these modest proposals, and I think that they are very limited in their scope to either repeal or to limit the thrust of in-State plaintiff diversity jurisdiction, are entirely compatible

with the preservation of the balance of general diversity jurisdiction, including the retention of the privilege of removal by an out-of-State defendant as a protection against whatever perceived local bias may be thought to exist.

In the fourth place, and I think it was touched on in remarks made by the chairman, and indeed by Mr. Moorhead already this morning, the Federal courts are increasingly being challenged to perform tasks in a changing jurisdictional environment. There is surely a growing recognition from all quarters that the resources are limited. Indeed, they are finite.

The nature of the caseload has changed. The volume and the complexity have changed. Because these resources are so scarce and so precious, it surely remains the province and the function of Congress to balance the importance of particular jurisdictional provisions and examine carefully which provisions continue to be vital to the role of the Federal courts.

In our view, ISP diversity jurisdiction is not essential to the fundamental mission of the Federal courts and accordingly should be either eliminated or limited.

With that, Mr. Chairman, I would be happy to answer any questions that the subcommittee may have.

[The prepared statement of Judge Marcus follows:]

Prepared Statement of Stanley Marcus, Judge, Southern District of Florida, and Chairman, Judicial Conference Committee on Federal-State Jurisdiction, and Chairman, Ad Hoc Committee on Gender-Based Violence

Mr. Chairman, I appreciate the opportunity to discuss with the subcommittee your proposal contained in H.R. 4446, and a similar proposal of the Judicial Conference of the United States concerning the repeal of in-state plaintiff diversity jurisdiction. I am testifying today in my capacity as Chairman of the Judicial Conference Committee on Federal-State Jurisdiction. These initiatives would correct a long-standing anomaly in the jurisdiction of the federal courts. That anomaly is generally referred to as "in-state plaintiff" (hereinafter ISP) diversity jurisdiction. In-state plaintiff diversity jurisdiction allows a plaintiff to litigate in federal court a civil claim based on state law, bypassing the state court system, even when the plaintiff is a citizen of the state whose court system the plaintiff seeks to avoid. There appears to be no federal interest in providing a forum for enforcing rights under state law when the plaintiff is a citizen of the state in which suit is brought. Although the approaches to this issue are slightly different, we believe they reflect the fundamental view that ISP diversity jurisdiction is no longer necessary.

Although many people believe today that state courts are unlikely to be prejudiced against out-of-state litigants, and hence that the general diversity jurisdiction of the federal courts should be reconsidered, the initiatives under consideration by this subcommittee today are limited in scope to a discussion of the repeal of ISP diversity jurisdiction. In September of 1993 the Judicial Conference reaffirmed its position supporting such repeal. These limited proposals are not linked to or reflective of antagonism to the general principle that federal courts should

provide an alternative forum for high-stakes civil cases involving litigants from different states. The proposals to repeal ISP diversity jurisdiction would have a limited effect on the general scope of diversity jurisdiction. Furthermore, the anticipated reduction in cases filed would leave federal courts better equipped to handle those diversity cases in which the party invoking the right to a federal forum is an outsider to the state court system.

Both H.R. 4446 and the Conference proposal share the idea that ISP diversity jurisdiction generally is no longer necessary, and the method of approach is similar. H.R. 4446 would amend 28 U.S.C. § 1332 by adding a new subsection (e) to provide that diversity jurisdiction may not be invoked if all plaintiffs in the suit are citizens of the state in which the suit is filed. The Conference proposal merely extends the elimination of in-state plaintiff diversity jurisdiction by stating that diversity jurisdiction may not be invoked if any plaintiff is a citizen of that state. We believe that enactment of either proposal would constitute a significant improvement over the present system.

IN-STATE PLAINTIFF DIVERSITY JURISDICTION - AN HISTORICAL RELIC

I would like to begin by discussing the history of ISP diversity jurisdiction, which was first enacted by Congress in 1789 as part of the Judiciary Act's creation of the federal court system. A review of that history demonstrates that the original justification for ISP diversity jurisdiction has entirely disappeared.

Since their creation in 1789, the trial courts in the federal system have been vested with both original and removal jurisdiction over controversies between parties who are citizens of different states. Congress has never exercised the full scope of its power to grant federal jurisdiction in diversity cases. The "general" diversity statute, 28 U.S.C. § 1332(a), has always

required a minimum dollar amount in controversy and complete diversity of citizenship of all parties with opposing interests. But despite this measured approach to implementation of congressional power to confer diversity jurisdiction, one feature of the jurisdiction has remained constant from 1789 to the present day. While forbidding removal to federal court by an in-state defendant, Congress has permitted federal diversity jurisdiction to be invoked by an in-state plaintiff.

Congress had particular reasons in 1789 for providing asymmetrically for access to general diversity jurisdiction by in-state plaintiffs, but not in-state defendants. The fundamental purpose of general diversity jurisdiction in 1789 was to provide a neutral federal forum for resolution of interstate commercial controversies, the lack of which was undermining the economic strength of a young nation. Of special concern was the impairment of credit markets by parochial state courts reluctant to enforce instruments of debt.

The congressional viewpoint that in-state plaintiffs merited the alternative forum of a federal court, but in-state defendants did not, made eminent sense because the underlying problem was not only perceived state court prejudice against outsiders, but also perceived state court prejudice against creditors. The national problem of impairment of credit -- which the Framers of 1787 recognized by writing into the Constitution the interlocking prohibitions of Article I, section 10, against state legislative action to alter the value of currency or otherwise to impair the obligation of contracts -- provided ample justification for giving a creditor the right to enforce a substantial debt in federal court whenever diversity of citizenship provided the constitutional basis for federal judicial power. Because there was no reason in 1789 for Congress to fear state court prejudice against debtors, as opposed to creditors, it made sense for

the First Congress to grant the right to invoke federal diversity jurisdiction by removal only to out-of-state defendants. Thus today's anomaly -- permitting in-state plaintiffs, but not in-state defendants, to bypass the court systems of their home states -- was not anomalous in 1789, when there was a genuine danger that state courts would disrupt the national economy and the rule of law by systematically favoring two distinct classes of litigants: home-state citizens, and anyone resisting the payment of a debt.

Whatever the arguments that may justify retaining general diversity jurisdiction in light of modern conditions in state and federal courts, the historical reasons for supplementing general diversity jurisdiction with ISP diversity jurisdiction have completely disappeared. I am aware of no modern arguments that in-state plaintiffs require access to federal diversity jurisdiction because state courts are systematically biased in favor of defendants in the adjudication of state-law claims or that state courts are systematically underenforcing state-created rights. Even if modern conditions continue to provide a sound justification for retaining general diversity jurisdiction, no independent theoretical justification can be found for retaining ISP diversity jurisdiction. Given the anachronism of the concerns of the First Congress for protecting creditor plaintiffs from perceived bias by state courts, repeal of ISP diversity jurisdiction is entirely compatible with preservation of the balance of general diversity jurisdiction, including the retention of the privilege of removal by out-of-state defendants as a protection against whatever local bias they may encounter when sued in state court by in-state plaintiffs.

THE CHALLENGES OF FEDERAL COURT ADMINISTRATION

Our argument for repealing ISP diversity jurisdiction is not based solely on a sense of history and the changed circumstances of modern times. The need for sound judicial

administration supports the call to repeal ISP diversity jurisdiction. Today's federal courts face new and increasing challenges.

There is a growing recognition that federal caseloads have increased markedly in size and changed in their complexity. In the thirty years from 1961 to 1991, filings in the district courts have nearly tripled. During the same period, filings in the courts of appeals increased ten-fold. While the population of the United States increased by slightly more than 200 percent since 1904, annual civil case filings during that same period increased by 1,424 percent, with most of the growth occurring since 1960. In 1950, nearly 55,000 civil cases were being filed each year in the federal courts. In 1992, the annual number of civil filings in the federal courts was 226,459. This quadrupling of the federal civil caseload was not distributed evenly across that docket. Three-quarters of the civil docket now consists of private civil cases. The proportion of private federal question cases has mushroomed, from about one-eighth of the federal civil docket in 1950 to nearly one-half today.

The number of diversity cases filed each year from 1950 to 1990 remained relatively constant as a proportion -- approximately one-quarter -- of all federal civil filings. In absolute terms, however, the number of annual diversity filings rose dramatically, from 13,124 diversity cases filed in 1950 to 57,183 filed in 1990. Among new diversity cases, the proportion of ISP diversity cases fell from about 53 percent in 1970, the first year for which such data is available, to about 43 percent in 1990, when 22,762 new ISP diversity cases were filed. There has been a temporary decline in the number of new diversity cases in the years since 1990, as a result of the increase in the jurisdictional amount which took effect in mid-1989. The data for 1992

shows that 16,033 new ISP diversity cases were filed, which was about 33 percent of all new diversity cases filed in 1992.

Although it is difficult to predict case filings, particularly in view of recent congressional initiatives, it is important to consider future issues that may confront the federal judiciary. If present trends continue, the federal courts' civil caseload will double every fourteen years, and in the twenty-eight years between 1992 and 2020 the compounded effect of that doubling and redoubling will raise the annual number of civil cases commenced from roughly 226,000 per year to nearly 840,000 per year. The same trends indicate that the federal courts' criminal caseload will grow more slowly, from present filings of about 47,000 cases per year to about 130,000 cases per year. These cases, however, will consist of ever higher proportions of time-consuming drug cases: 69 percent of the criminal docket in 2020, versus 26 percent at present. The federal courts' appellate caseload is similarly projected to grow by 830 percent, from about 46,000 appeals per year to nearly 430,000. Under current workload standards this volume of litigation would require an enormous increase in the number of district judges and circuit judges, transforming the existing nature of the federal judicial system virtually beyond recognition.

Although it is the province of Congress to determine the jurisdiction of federal courts, there are certain functions that are fundamental to the mission of the federal judiciary. As Congress continues to change the jurisdiction of the federal courts, in light of contemporary social and economic developments, it remains an obvious concern of everyone to ensure that scarce judicial resources are used wisely. Repeal of ISP diversity jurisdiction would assist the federal courts in meeting the needs of contemporary plaintiffs who seek judicial enforcement of the rights conferred on them by federal law.

THE CORE FUNCTIONS OF THE FEDERAL COURTS

Ultimately, the challenge presented by the projected caseload trends can be met in only three ways: increasing the number of judges, decreasing the number of cases, and increasing the numbers of cases disposed of by each judge. Of course these three means of coping with rising caseloads are not mutually independent, and the best strategy is probably some combination of these three options. But it is important to note that the judicial branch cannot respond to rising federal caseloads without the help of the other branches of government.

The Constitution leaves the implementation of the first option almost exclusively to the Congress and the President. While federal judges can have a minor impact on the number of available judgeships by accepting senior status when eligible and continuing to maintain active caseloads as senior judges, only Congress can determine the total number of authorized judgeships, and only the President can fill any vacancies that are created by retirements or the creation of new judgeships.

The second option is also dependent principally on action by the Congress and the President. While federal judges can abstain from deciding some cases when restraint is necessary to the proper exercise of judicial power, the Constitution leaves the basic power to decide the scope of federal jurisdiction to the legislative process. In addition to his role in that process, the President has an important voice in the actual caseloads of the federal courts through his control over the litigative policies and practices of executive agencies.

The third option is largely within the province of the judiciary, although the number of cases that individual federal judges can adjudicate each year is affected in important ways by levels of staff and other resources provided by the legislative process. Our continuing efforts

to improve the productivity of federal judges and increase our administrative efficiency alone will not ensure the ability of the federal courts to perform their core functions with the wisdom and excellence that the Constitution expects, and to which all Americans are entitled.

There is great danger in permitting the sheer quantity of cases on the docket of each federal judge to impede the quality of the time and attention that a judge can expend in adjudicating each case. If caseload pressure interferes with the federal judiciary's performance of its fundamental responsibilities, the integrity of our entire constitutional system may be threatened, at incalculable cost.

The proper scope of federal jurisdiction is, of course, a question of considerable political and academic controversy, and I have no desire to venture into those thickets. Pursuant to the "Madisonian compromise" the Constitution defined the outer limits of federal judicial power in generous terms, and wisely committed to the political judgment of Congress the practical determination of what sorts of lower federal courts there should be, and what cases they should decide. There are a number of scholars who, as a result of the ensuing two centuries of experience with a dual system of state and federal courts, have found it possible to identify a number of core functions which the federal courts must be able to perform if we are to remain faithful to the constitutional vision of the Framers:

(1) The federal courts must enforce the institutional arrangements and individual rights provided by the United States Constitution;

(2) The federal courts must protect the interests of the federal government as the national sovereign;

(3) The federal courts must resolve disputes between states as coordinate sovereigns within the federal system;

(4) The federal courts must ensure the uniform interpretation and application of federal statutes and treaties;

(5) The federal courts must develop federal common law to fill gaps in the express text of statutes, treaties, and the Constitution and Acts of Congress where the application of state law would conflict with important federal interests; and

(6) The federal courts must preserve the hierarchical integrity of federal law by hearing appeals from inferior federal courts and administrative agencies.

BENEFITS OF REPEAL OF ISP DIVERSITY JURISDICTION

These core functions taken together generally comprise the essential mission of the federal judiciary. An inability to perform any one of these six core functions could jeopardize the stability of the balance of power among the branches of the federal government, between the federal government and the states, and among the states. The challenge facing the federal judiciary today is choosing between competing priorities. As the caseload increases there is a serious risk that, sooner or later, overloaded federal courts without matching increases in resources will become unable to perform certain core functions with the distinction and detachment that exemplifies American constitutional democracy.

The original historical justification for requiring federal courts to adjudicate ISP diversity cases has lapsed. It is equally difficult to identify how ISP diversity jurisdiction cases contribute

to the ability of the federal judiciary to perform its core functions. The question remains whether repeal of ISP diversity jurisdiction would make a significant contribution to the ability of the federal courts to perform those functions.

Mr. Chairman, I cannot state with certainty that our proposed legislation would have a major impact on current federal civil caseloads. Our proposal is a very conservative one that seeks to minimize its impact on the scope of general diversity jurisdiction by allowing current ISP diversity cases to continue to be adjudicated in federal courts by either of two alternative routes. A plaintiff who would be barred by our proposal from filing a diversity case in his or her home state retains the right to file that case in any other state in which the defendant is subject to personal jurisdiction. Moreover, a diverse defendant sued in state court by an in-state plaintiff retains the right to remove that case to federal court. These two alternative avenues for invoking federal diversity jurisdiction over cases that are presently filed as ISP diversity cases make it impossible to offer more than an educated guess of what the net effect would be were our proposal to be enacted into law.

At present, approximately 33 percent of all new diversity cases are filed by in-state plaintiffs, amounting to 16,033 new ISP cases in 1992. Our preliminary estimate is that the net reduction in the diversity caseload resulting from repeal solely of ISP diversity jurisdiction would by enactment of our version of § 1332(e) probably be somewhat less than 33 percent, however -- on the order of 15 to 20 percent. In other words, we expect that about half of the cases disqualified from federal jurisdiction as ISP diversity cases would come back into the federal court system by either of the alternative routes I mentioned -- by the plaintiff's decision to file the case in an out-of-state federal court, or by the defendant's decision to remove to federal

court a case filed in state court by an in-state plaintiff. Although the bill's version of § 1332(e) is slightly narrower than the Conference proposal, since it bars ISP diversity jurisdiction only when all plaintiffs are forum-state citizens, we think it would yield nearly the same net caseload reduction benefit. Thus, under either version of § 1332(e), we would expect to reduce federal civil caseloads by about 8,000 new cases per year.

Although it is inherently speculative to attempt to quantify the probable percentage of ISP suits that will become federal diversity suits by redirection, there is good reason to think that ISP repeal will indeed cause a substantial net reduction in federal diversity caseloads. There are two pragmatic considerations at play which make it likely that many cases routed to state court by our proposal will indeed remain there. First, from the plaintiff's perspective, there are significant disincentives to making an "end run" around the repeal of ISP diversity jurisdiction by filing out-of-state. To do so, the plaintiff must give up the benefit of the substantive law of his or her home state, and must incur the costs and uncertainty of proceeding under the law of some other state. Second, it is not a foregone conclusion that defendants would remove to federal court a high proportion of those cases which in-state plaintiffs unwilling to go out-of-state would be required by our proposal to file in the state courts.

It bears emphasis that our conservative proposal for repealing ISP diversity jurisdiction intentionally leaves the keys to the federal courthouse in the pockets of the litigants themselves. While this makes it difficult to predict accurately the effects of the repeal, it also makes it difficult to conceive of cogent reasons why Congress should not eliminate the historical anomaly of ISP diversity jurisdiction.

SUMMARY

In conclusion, Mr. Chairman, although the Judicial Conference proposal is somewhat broader than your proposal contained in H.R. 4446, we believe that enactment of either proposal would constitute a significant improvement over the present system. For the convenience of the subcommittee, I have attached a copy of the language repealing in-state plaintiff diversity jurisdiction approved by the Judicial Conference in September of 1993. We appreciate your leadership on this and other issues of federal jurisdiction and thank you for the opportunity to present our views before the subcommittee.

REPEAL OF IN-STATE PLAINTIFF DIVERSITY JURISDICTION

The Judicial Conference of the United States approved the following language at its September 1993 meeting:

> (e) The original jurisdiction of the district courts otherwise conferred by this section may not be invoked if any plaintiff joined in the complaint is a citizen of the state in which is located the district court in which the suit is filed. For purposes of this subsection only, the District of Wyoming shall be deemed located solely within the State of Wyoming. This subsection does not apply to or limit the applicability of the right of removal under section 1441(a) of an action that would otherwise be within the original jurisdiction of the district courts.

Mr. HUGHES [presiding]. In the written testimony submitted by the ABA, they pose an example wherein a local plaintiff may sue an out-of-State corporation but still fear local bias if the corporate defendant is the major employer in his or her small town.

What would be your rejoinder to that in-State plaintiff's need to sue in Federal court?

Judge MARCUS. Well, I think the first answer that strikes me is that as you canvass the literature available on the subject, I can find precious little, if any, empirical evidence to support the notion that a plaintiff in a State court can't get a fair shake in his or her own home forum when the plaintiff is suing based upon State law in State court.

The original concerns of the Founding Fathers were at least the following two: First, the concern that an out-of-stater might face bias or prejudice if suing in the plaintiff's home forum; and second, the concern that the rights of creditors might otherwise be impaired if there was not a neutral Federal forum.

Neither of those principles or objectives in any way that I can see advance the idea of retaining in-State plaintiff diversity jurisdiction. We are talking now about a plaintiff in his or her own State being required to use initially his or her own forum to enforce laws created by the State itself.

And so the first answer that I have is there seems to be no empirical evidence or precious little to support the idea that the plaintiff can't get a fair shake in his or her own forum.

The proposals here, H.R. 4446 and the Conference proposal, in any event, permit a plaintiff to use a Federal forum in another State, if indeed there is some compelling reason to do so. All these proposals would do is create parity between in-State plaintiffs and in-State defendants, that is to say, to put them on the same footing with regard to access to the Federal courts.

Mr. HUGHES. The ABA also in its testimony states, and I quote, "In fact, quite little is known about why diversity jurisdiction was provided for in the Constitution and the Judiciary Act of 1789," end of quote. They are citing Richard Posner, the "Federal Courts Crisis in Reform, 1985." Do you agree with that particular statement?

Judge MARCUS. Well, I think that when the Founding Fathers created diversity jurisdiction, and indeed the first Judiciary Act provided for it, they were concerned about two central things: First, perceived bias that an out-of-stater may face if sued in a home State forum; and second, their concerns about enforcing the obligation of contracts and creditors' rights. I suggest most respectfully that in the last decade of the 20th century, neither of those concerns with respect to this particular proposal concerning in-State plaintiff diversity govern any longer.

The in-State plaintiff can hardly be said to be a victim of bias in his or her own forum. And I know of no one who seriously can suggest today that the State courts are somehow underenforcing—State created laws—laws in contract and tort.

So my answer to you is that I guess, as difficult as it is to define legislative purpose, particularly if you have to look back 200 years, there are some clear things we can tell about the purposes of the

Founding Fathers. And neither of those central concerns are relevant with regard to this limited proposal concerning the elimination of in-State plaintiff diversity jurisdiction.

Mr. HUGHES. Were those particular concerns articulated fairly well in general debate and documents and other papers that were of the same vintage that led you to believe that those were the central concerns with diversity jurisdiction?

Judge MARCUS. Yes, sir, and I think in the paper that we submitted to the subcommittee, we cited some of the historical bases and studies that suggest what these particular concerns were——

Mr. HUGHES. You don't agree with the statement that very little is known about the rationale?

Judge MARCUS. I do not. I think we know a fair amount about the rationale. We can find a fair amount in the Supreme Court case law going back almost 200 years. Chief Justice Marshall expounded as to what the central reason was perceived to be for diversity jurisdiction; i.e., the fear of bias against an out-of-stater in a home State plaintiff's forum.

Mr. HUGHES. The difference between H.R. 4446 and the U.S. Judicial Conference recommendation is that H.R. 4446 would only limit in-State plaintiff diversity jurisdiction in which all plaintiffs, rather than any plaintiffs, are citizens of the State in which the suit is filed.

Can you share with us what you believe the impact of these two different approaches would have had on your caseload if they had been the law in prior years?

Judge MARCUS. I think that the differences between the two proposals are modest, indeed, as you point out. In the one instance, H.R. 4446 would foreclose diversity jurisdiction only if all the plaintiffs are in-State plaintiffs.

In the other proposal, it is precluded if any of the plaintiffs are a citizen of the State in which suit is brought. I think the differences are marginal in terms of language and effect.

The more basic question you ask is a very difficult one. It is to suggest or to attempt to look back and look forward from whatever empirical data we have and answer the basic question, which you are really putting forth, what impact would this proposal have?

We know the following about the statistical base and some of it is in the materials that we have submitted. The latest available figures show that there are roughly 50,000 diversity cases in the Federal courts out of a total caseload of about 220,000. Of the 50,000 diversity cases for the year 1992, there were a total of 16,033 in-State diversity cases. So about a third of the diversity caseload as a whole would be ISP cases in particular. And these proposals would only deal with that narrower band of cases, roughly the one-third, roughly the 16,000 cases.

If either proposal were adopted, either H.R. 4446 or the Conference proposal, those numbers would drop and drop markedly. The question is how much would it drop. We know that both of these proposals are modest in nature because they still give the plaintiff the opportunity to walk into Federal court if there is a compelling reason why they wish to do so.

So some cases would come back into the Federal courts, even if you eliminated ISP diversity jurisdiction completely. They would

come back in one of two ways. The plaintiff could sue in another State in Federal court, or because the defendant, if the defendant is an out-of-stater, would be able to remove the case to Federal court in any event.

Our best estimate—and it is no more than that—is that roughly half of the 16,000 cases would come back into the Federal system through either of these two routes, leaving about 8,000 cases. But that is the roughest of estimates.

And we suggest to this subcommittee that the numbers are meaningful, whether you are talking about 8,000 or 16,000. And the compelling question becomes whether or not there is some powerful interest that the national sovereign has to create a forum in Federal court for an in-State plaintiff. Our view is that it is very hard in the last decade of the 20th century to find much in the way of persuasive reasoning to do that.

Mr. HUGHES. Thank you very much.

The gentleman from California.

Mr. MOORHEAD. Thank you. On the Federal Courts Study Committee, most of the Federal judges felt that there was a real advantage in keeping the Federal courts relatively small so that they were hearing significant cases of major importance to the country. And most of the lesser cases should be kept in the State courts.

Recently we have been moving in the other direction of sending picketing cases to the Federal courts. We are going to be sending, if legislation passes, nonsmoking provisions to the Federal courts. Some of these diversity cases are not always the most important pieces of legislation.

Do you think the Federal courts are being somewhat demeaned by the kinds of cases that Congress is determining for them?

Judge MARCUS. Well, I think the thrust of the question that you put forth is a fair one as to—and again it asks this basic question. What do you want the Federal courts to do?

That determination was wisely left to Congress, not to the courts. It is for the Congress to determine whether there are inferior Federal courts and what kinds of cases they ought to be hearing.

I think it is true that the nature of the jurisdiction is changing right before our very eyes in the last decade of the 20th century. And it is expanding and expanding rapidly in view of different and contemporary views of economic and social and political problems.

And it is surely for Congress to determine what these competing interests are and how basic the claim may be. But the basic point you make, I think, is well taken. The Federal courts are courts of limited and specialized jurisdiction.

The last time I looked, Congress had authorized 749 article III district court judgeships throughout the United States and 179 circuit courts judgeships. That is the totality of the Federal judicial system in terms of article III officers plus the nine Supreme Court Justices.

The numbers are very limited, particularly in relationship to the State systems. There are roughly 28,000 State judicial officers. So it quickly becomes apparent that the Federal courts are courts of limited and specialized jurisdiction. And they are really quite small, particularly in relationship to the State systems.

Mr. MOORHEAD. One of the problems is that big corporations find that they have a lot of money to spend on legal actions, but there are a lot of people that are not wealthy that get dragged into these things, and there is a much smaller percent of lawyers that actually like to practice in the Federal courts or are licensed to practice there. I know they can become licensed fairly easily, but they just prefer not to.

Yet—and the Federal courts are not as easy to get to. If you live in downtown L.A., they are, but if you live some distance, it is a more expensive proposition.

As we move more and more things into the Federal courts, are we making it more difficult for the common person that may, if they lose $5,000 or $10,000 in a trial or $100,000, be wiped out before they even get to the cost of lawyers and the case itself. Are we denying justice to the American people by continuing to build up the number of cases and the kind of cases that are going to the Federal courts?

Judge MARCUS. Well, I think that the great risk is that as the jurisdiction of the Federal courts expands and the numbers of judges remain essentially finite, although the number of judges has indeed expanded substantially in the last 30 years, the ability of the courts to handle the cases well and fully becomes more difficult.

As a personal example, I sit in the Southern District of Florida, a very busy trial court. In the year 1992, the judges in our court, if you took together all of the hours we spent just on trials, you would find that we spent better than 84 percent of our time simply on the trial of criminal cases, and perhaps 15 percent on the trial of civil cases.

That is a wholly disproportionate allocation of the scarce resources of the Federal judicial system. So I think the point you make and the question you raise really is well taken, and it is what form does the Congress wish the Federal courts to take? What kinds of cases are sufficiently important to the interests of the national sovereign to move into the Federal system?

Mr. MOORHEAD. Well, one of the arguments that is most often given by the proponents of diversity is that the State courts are so crowded that they have to wait a long time to get to court. I know that is maybe true in the major cities of the country. In fact, you wait a long time if you want to go to the Los Angeles Municipal Court, it may be years before you get there.

But are people really being denied their right to justice if we cut back on the ability to exercise diversity?

Judge MARCUS. I think the answer to the question is no. And I would begin first by noting that the State Conference of Chief Justices specifically has presented a statement to this subcommittee clearly indicating not only their willingness, but their perceived ability to hear the cases that might come in if there was an elimination or limitation of ISP diversity jurisdiction.

They believe, and presumably they may be the most able to answer the question, that they are fully capable of handling these cases. If you look at the number of cases that we are talking about, in 1992 some 16,000 cases, even if none of these cases came back into the Federal system and all 16,000 were distributed among the

50 State judicial systems, it seems clear to me that they could easily handle that caseload.

Again, we are talking about 28,000 judicial officers. The last time I looked, there were 9,602 judges of general jurisdiction in 1992 in all of the State courts. And so I think that when spread across all 50 States and all of these judicial systems, the Conference of Chief Justices is right in its conclusion that they could well handle the additional caseload that might be affected by the limitation or elimination of ISP diversity jurisdiction.

Mr. MOORHEAD. I have other questions, but I expect that my time is about to run out.

Why is the Judicial Conference seeking to repeal the in-State plaintiff diversity jurisdiction when other factors contribute to caseload congestion?

Judge MARCUS. I think that it is true that many factors affect the heavy dockets in the Federal courts, including the criminal caseload and the creation of new civil causes of action.

And there are a number of new initiatives, as you know, pending in Congress, including crime legislation and health care legislation, each of which would very substantially expand in some form or measure the jurisdiction of the Federal courts.

I think, however, that this subcommittee is to be commended for promoting this dialog or debate about how to use the scarce, finite, precious resource of the court system.

And I suggest most respectfully that this is one reasoned, modest way to focus on this question of jurisdiction, altogether compatible with the measured way the Congress has handled diversity jurisdiction right from the beginning. Congress has always required a certain jurisdictional amount, and it has raised it over the years.

The Congress has always required complete diversity jurisdiction on both sides of the equation. And this proposal of either eliminating or limiting ISP diversity jurisdiction is altogether compatible with that approach.

There are other issues that are raised by your question. I think the answer is clearly yes. This is not a panacea for all of those issues, but it is one logical and reasonable step it seems to me in examining what the role of the Federal courts should be.

Mr. MOORHEAD. Thank you very much.

Mr. HUGHES. The gentleman from California, Mr. Edwards.

Mr. EDWARDS. Thank you. I have no questions.

We want to move along. But I want to thank Judge Marcus for all the help that he has given in the past and his excellent testimony today.

And I think Congress is starting to realize what they have done in overloading the Federal courts with jurisdictions that really should be—cases that should be in the State courts.

It is a very hard message to get through, and the Federal judiciary has to keep sending the message, because you are so impacted with this problem. And actually Congress doesn't know what it is doing when it lightly gives you, your courts, jurisdiction over some of these drug cases, hundreds perhaps thousands of drug cases that really belong back home.

It is getting so bad in California in my area that civil cases are so backed up in both the Federal and the State courts that it is

becoming a widespread practice to have rent-a-judges. State judges who are leaving the bench in order to engage in this lucrative practice where Silicon Valley companies pick a judge and get a quick civil trial because they can't afford to wait.

You have been a lot of help. And I hope, as I leave this year of my life, that you keep sending the message. And all the judges keep sending the message that you don't want to turn the Federal system into a system of State police courts with jurisdiction with cases that just don't belong there.

But thank you again.

Judge MARCUS. Thank you.

Mr. HUGHES. Without objection, I am going to introduce for the record a written statement of the Conference of Chief Justices, which the judge has alluded to.

[The information follows:]

THE CONFERENCE OF CHIEF JUSTICES

STATEMENT ON

H.R. 4446

H.R. 4446, introduced in the 103rd Congress, Second Session, would eliminate the right of an in-state plaintiff to invoke federal diversity jurisdiction to sue an out-of-state defendant in the federal courts of the plaintiff's own state. This bill would eliminate a long-standing favored treatment of in-state plaintiffs over in-state defendants, who are not permitted to remove a case to a federal court if sued by an out-of-state plaintiff. The Conference of Chief Justices affirms the willingness of the state court systems to assume any additional caseload resulting from adoption of H.R. 4446 and supports the idea of establishing equity between in-state plaintiffs and in-state defendants with respect to diversity jurisdiction.

The position of the Conference in favor of H.R. 4446 is consistent with the established policy of the Conference of Chief Justices. The state court systems have long been amenable to elimination or reduction of federal diversity jurisdiction. In a formal resolution adopted at the 29th Annual meeting of the Conference of Chief Justices in Minneapolis, Minnesota, July 1977, the conference took the following position on diversity jurisdiction:

> Our state court systems are able and willing to provide needed relief to the federal court systems in such areas as:

* * * *

(C) The assumption of all or part of the diversity jurisdiction presently exercised by federal courts.

At its 39th Annual Meeting the Conference of Chief Justices supported the amendment of 28 U.S.C. 1332 to provide that in diversity of citizenship cases, the value of the amount in controversy should be increased from $10,000 to $50,000. The position of the Conference was based largely on a desire to help alleviate the workload burden of the federal courts in an area of federal jurisdiction where federal judges are compelled to follow state law and are filling a role more easily performed by state judges.

In supporting H.R. 4446 the Conference of Chief Justices reaffirms its commitment to assisting federal courts by taking on those cases entering state courts as the result of eliminating or reducing diversity jurisdiction.

DIVERSITY JURISDICTION

WHEREAS, the American Bar Association has proposed amendment of 28 U.S.C. 1332 to provide that in diversity of citizenship cases, the value of the amount of controversy be increased from $10,000 to $50,000; and

WHEREAS, the proposed increase would do little more than restore the *status quo ante* by accounting for inflation since the $10,000 amount was established in 1958;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices supports an increase to $50,000 in the jurisdictional amount without otherwise modifying its existing position on diversity jurisdiction.

Adopted as proposed by the State-Federal Relations Committee of the Conference of Chief Justices at the 39th Annual Meeting in Rapid City, South Dakota on August 6, 1987.

BE IT RESOLVED that the Conference of Chief Justices approves the recommendations of the Committee of Federal-State Relations concerning the following principles:

(1) Every citizen should have access to our court system as the ultimate forum for the resolution of unavoidable disputes and the protector of his constitutional rights.

(2) The demand for access to our court systems in this country can be expected to increase significantly in the years ahead - a demand which will be implemented by plans for prepaid legal insurance and other methods of making legal services more generally available.

(3) Efforts to divert, where appropriate, the processes of dispute resolution from the federal and state court systems through devices such as arbitration are to be encouraged and accelerated, but such diversion is only a partial answer to the problem.

(4) Notwithstanding reasonable expectations of dispute diversion, it can be anticipated that our federal court system will continue to be overburdened unless increased recognition is given to the role of state courts.

(5) Our state court systems are able and willing to provide needed relief to the federal court system in such areas as:

(A) Adequate review of state court criminal proceedings to assure that federally defined constitutional rights have been fully protected;

(B) Increased participation in the resolution of federal question cases;

(C) The assumption of all or part of the diversity jurisdiction presently exercised by the federal courts.

(6) National funding to the states should include procedures and allocations to assure that the state court systems receive an equitable share of the funds without prejudice to the independence of the judiciary.

(7) Increased communication between congressional committees considering legislation affecting state courts and such entities as the Conference of Chief Justices will be useful.

Adopted at the 29th Annual Meeting in Minneapolis, Minnesota, July 1977.

L. Policies concerning the business of the Conference

120. Compilation of a history of the Conference (September 18, 1982, page 170).

121. Responses to out-of-state surveys (August 2, 1984, page 171).

122. Approval of Midyear Meeting Guidelines (August 8, 1985, page 172).

123. Supporting the recommendation of the CCJ/COSCA Annual Meeting Guidelines Committee and that both CCJ and COSCA appoint an Annual Meeting Guidelines Committee as either a standing committee of their respective conferences or as a committee appointed on an annual basis (August 8, 1985, page 173).

124. The establishment of an appropriate procedure for the periodic review of all Conference positions on policy issues to ensure that such positions reflect the current views of the Conference membership (August 4, 1988, page 174).

125. Congratulating Chief Justice Frank X. Gordon, Jr. and the Arizona Judicial System on the creation of the new facility for the Arizona Supreme Court and expressing the Conference's appreciation for the opportunity to participate in the dedication of this building and honoring the memory of Dr. Martin Luther King, Jr. (January 31, 1991, page 175).

Mr. HUGHES. Thank you once again, Judge, for an excellent presentation. I thought that your statement was extremely well researched and ably presented, as always. And we thank you for your assistance.

We had before us yesterday in New Jersey, the entire New Jersey Prosecutors Association that came in to lobby us on a number of issues, not the least of which is the Eddie Byrne Memorial Fund which they are deeply committed to.

I found it interesting that they had about four items on their agenda. One of them was the tendency to federalize State crime. That is progress, because one of the problems in the past has been the argument here in Congress, that by creating new Federal crimes we are aiding State prosecutors by having additional forums of prosecution for State crimes.

The prosecution, however, understands the danger of the present tendency to federalize State crimes. So it is good to have them also as advocates to try to restrain our tendency to federalize everything that comes before us in this body.

So thank you very much. The testimony was very helpful.

Judge MARCUS. Mr. Chairman, thank you very much for considering our views.

On a personal note, I wanted also to express our appreciation in that Congressman Edwards has alluded to the fact that both you and he are retiring after this term, and I wanted to just for a moment extend our appreciation for the extraordinary leadership you both have shown in the areas we have talked about, and really in the areas related to the Federal courts. So, I thank you both.

And I thank this honorable subcommittee for considering our views.

Mr. HUGHES. Thank you. We appreciate that. It has been our pleasure.

Our first witness on the next panel is Mr. John Frank, who is a partner in the law firm of Lewis & Roca and general counsel to the Arizona Democratic Party. Mr. Frank has been a member of the Rules of Practice and Procedure Committee of the Judicial Conference of the United States and has taught at Indiana Law School and Yale Law School.

Mr. Frank served as law clerk to Justice Hugo Black during the October 1942 term of the U.S. Supreme Court and has published extensively on matters of legal history and constitutional law. He has also participated for many years in Congress' discussion on diversity jurisdiction and appears today on behalf of the Arizona State Bar Association.

He is no stranger to this subcommittee, and we are very happy to welcome him once again.

Our second panelist is Mr. Mitchell F. Dolin who is co-chair of the Federal Legislation Committee of the litigation section of the American Bar Association. Mr. Dolin is a partner in the law firm of Covington & Burling, which he joined as an associate in 1982.

Prior to that time, he clerked for Chief Judge Charles Clark of the U.S. Court of Appeals for the Fifth Circuit.

Mr. Dolin is also active in other law-related activities, such as the American Law Institute, National Legal Affairs Committee of

the Anti-Defamation League of B'nai B'rith, the D.C. Board of Professional Responsibility and the Lawyers Committee for Human Rights.

We welcome both of you. We have your statements which we have read, and without objection, they will be made a part of the record in full.

We would like you to summarize for us, if you would.

Mr. Frank, welcome.

STATEMENT OF JOHN P. FRANK, SENIOR PARTNER, LEWIS & ROCA LAW FIRM, PHOENIX, AZ, ON BEHALF OF THE ARIZONA STATE BAR ASSOCIATION

Mr. FRANK. Thank you, Mr. Chairman. It is nice to be back again. I have been before this committee on and off over the years and do agree, we know each other.

I have been here on the diversity subject whenever it has come up, and have represented a State bar in some of the previous hearings. I represented the Committee to Maintain Diversity Jurisdiction, a national group, and I have, on occasion, represented all 50 of the State bars in opposing legislation to restrict diversity.

Because it has been such a short time since the announcement of this hearing, it has been impossible to poll all the bars. But I think I can fairly say that the bar of the country is fairly close to 100 percent opposed to this legislation. Mr. Dolin is here to speak for the ABA.

I have checked with ATLA. In the short time, they couldn't get somebody here, but they have rechecked with their governing board and they also oppose this legislation.

The American College of Trial Lawyers has opposed this legislation or anything like it in the past. Its proper authorities could not be polled so quickly, but Mr. Francis Fox, who is Chairman of the Committee on Procedure and a member of the Federal Committee on Civil Rules of the Judicial Conference also opposes the proposals now before the committee.

What I am saying is that I think we get here, to put it baldly, is a class struggle. As lawyers, we don't want this reduction in the jurisdiction, and we have a deep conviction about it.

Our experience also is that a good many Federal judges would like to keep the diversity jurisdiction. It gives, for many of them, a pleasant variation in the general run of the heavy criminal stuff that you talked about, and the Social Security and other routine matters that load their dockets.

In my statement, I have reviewed the history of the diversity jurisdiction, but I am going to skim over that except to note merely that the original—I am satisfied that the original jurisdiction objections were largely based on interstate concerns about interstate prejudice as between States and the citizens of other States.

But in more recent years, the focus has materially changed. The criticism of this head of jurisdiction reflected in this discussion today, which was lead by Chief Justice Burger and by Representative Robert Kastenmeier, who is my good friend and whom I have supported strongly and regard this as the only blight in an otherwise perfect career in the world of judicial administration, has switched to other grounds.

And we now get the arguments simply that the Federal courts are too busy to handle the diversity cases and that we are loading them with so many other things that we should dump these over to the State courts.

The proposals of this sort have failed in the past because the bar continues to like diversity jurisdiction and to support it. As I noted earlier, generally speaking, diversity has been supported here by the entire bar of the country, ABA, ATLA, 50 States, the American college.

Now, let me get to it. The fundamental value of diversity jurisdiction today, and this applies equally to the in-State plaintiff cases, is that it is one of the oldest and best social services of the Federal Government.

The original Federal court jurisdiction was almost entirely permissive. Congress was under no obligation to create diversity jurisdiction and didn't have to create Federal trial courts at all, but it did, and it permitted the Congress to—the Constitution permitted the Congress to create diversity.

The first Congress did choose to do so. The only Federal service to the people of the country of that degree of antiquity is the Postal Service. Now, the first tangible value of diversity is the disposition of some 50,000 cases a year.

The fundamental argument for eliminating in-State plaintiff jurisdiction is the argument that somehow this would relieve the Federal courts of some significant burden. We recognize that the Federal courts are overburdened. We recognize that this Congress of late has been loading prodigious burdens on the Federal courts and is apparently about to do another whole truckload with the crime bill.

I share the regret in federalizing State matters, but I respectfully submit that that is not a reason for throwing out the established heads of jurisdiction simply because the jurisdiction is being, as some of us suppose, is being a bit overloaded with new notions.

Let me talk about the in-State plaintiff cases which are something less than the whole. But you have to see it, first of all, that the diversity cases are not a very prodigious burden, and relatively a diminishing burden at that.

The number that reached the Federal courts—appellate courts is quite small. In 1992, the total of all appellate cases was about 32,000, and the number of diversity cases, all of them, in-State plaintiff, all the rest, was about 3,000. The fact is that we are dealing with a basically small number at the appellate level. You are not going to relieve any problems there.

At the trial court level for 1992, the total number of civil filings—civil only, not the criminal, was about 231,000. Of those, the U.S. cases were about 62,000. The private Federal cases were 118,000, and the diversity cases were 49,000.

The hard fact is that since I last appeared here, whenever it was, certainly when I last wrote in 1978, the number of civil cases has doubled, but the number of diversity cases has been essentially static. It is just by the normal drift of things, a receding head of Federal jurisdiction.

In terms of the bearing of the diversity cases on the total trial burden of the Federal courts, the burden is very slight. Out of

111,000 Federal question cases terminated in 1992, 4,000 were disposed of during or after trial.

For that same period, the 50-plus thousand diversity cases were terminated. The number terminated after trial was 3,000. Of those diversity cases, 13,000 were terminated with no court action, and 41,000 were terminated before, during, or after pretrial, which means, of course, that they were settled.

Now, we don't know—I don't know how many of those were in-State plaintiffs. The figures given us by Judge Marcus, who is a splendid representative of the Judicial Conference, gave you a figure of 16,000 out of 50,000 as in-State plaintiffs, and I am not acquainted with the source of his number. I accept it, but I don't know where he got it.

Assuming that that is the case, the number, roughly a third, the number of actual trials that you were thinking of eliminating is on the order of 16,000, which is not a very major part of the total burden on the Federal courts.

But in the course of achieving that solution, you create a greater problem necessarily, and I want to make the point especially raised by Representative Moorhead and Representative Edwards, you move the cases out of the Federal system, you put them into the State system.

Now, I know it is common to say, as Judge Marcus just did, that the State systems are so big that tossing an extra 50,000 cases in there doesn't make much difference. Why is the bar so distressed about this? Why do you have the entire bar of the country opposing these proposals?

Let me be as specific as I can. I am sorry to say that I have to make some apples and oranges comparisons because the State Judicial Center does not give us statistics that are readily comparable with those of the Administrative Office of the U.S. Courts.

But I have, in preparation for the testimony today, talked with the head of the State center, who has helped me out on this, to the two busiest in the New York areas, Manhattan and Brooklyn, which are roughly equivalent to the Southern and Eastern Districts in New York, and I have talked to the State court in Cook County, which equates to the Northern District of Illinois, and then in the area of the California people, I have talked to the San Francisco and the Los Angeles and Orange County administrative personnel, which equate to the Northern and Central Districts in California.

The figures can be compared at least in a kind of a way with those of the Federal courts, and the result is extremely discouraging.

Take Chicago. The average time from filing to closing a civil jury case in Chicago in 1993 was 56.7 months, 5 years. If we compare that with the median time for disposition in Chicago in the Federal court, the median time is 4 months.

In the Northern district—in Chicago—only 10 percent of the cases took more than 21 months. In short, what you are doing with the Chicago cases if you adopt this legislation is taking cases off at least a moderately fast track and putting them off for a delay of several years.

I appreciate, I know the elements of these comparisons because the figures don't quite match, but it gets you the idea.

Take the great cities of both coasts. In New York City, in the Southern District, the Federal court, the median time for all civil cases is 8 months and in Brooklyn, the Eastern District it is the same.

Now, New York State does not keep figures that are at all comparable, but it does have 1993 data on the time between its ready date, called the notice of issue, and the deposition. In other words, from a time well into the case to its end, and the period of time in Manhattan from that late stage of the case to its end averages 10 months, and in Brooklyn it is 17 months.

These are hard to compare. I acknowledge that, but please permit the generalization that you are taking cases off a docket which may be loaded, but at least it is three times as quick as the dockets to which you are going to send these matters.

The same thing is true in San Francisco and Los Angeles. In San Francisco, the median time is 7 months on civils and in the Southern District, L.A., the median is 8 months. On the State side, the normal time from filing to disposition in San Francisco is 22 months, and Los Angeles it is 25 months, and in Orange County, 60 percent of the cases took over 2 years to get from the beginning to the end.

Please permit me to summarize; of course, your time is short, but let me return to my fundamental theme. Dispute settling, that is what we are talking about, disputes between people or businesses that have to be settled.

Dispute settling is a basic service which the Federal Government has offered its people in diversity situations since 1789. I want to put it as the basis of a social service like carrying the mail, providing for the national defense, assisting to settle labor disputes, assisting agriculture. It is only a moderately expensive service, as these things go.

To deny the service will force some 16,000, we are told, portion of 50,000 cases to give up the Federal forum. I don't know the number of people involved. We have no data on that, but since cases commonly have many plaintiffs, some have great numbers, we could be talking about hundreds of thousands of people.

You now, the practical result is to force these people to wait longer and in many cases years longer for the disposition of their disputes. I am not preaching the cult of the superman, arguing that all Federal judges are better than all State judges, or even that most of them are.

I say only that many thousands of Americans have believed that they would be better off in the Federal court than in the State court. This may have been because of their views of quality. It may have been because of their views of timing. It may have been because of wholly different reasons.

The point is that for more than two centuries these people and their ancestors before them have been entitled to make that choice. They should not be deprived of that option now.

Thank you.

Mr. HUGHES. Thank you, Mr. Frank.

[The prepared statement of Mr. Frank follows:]

PREPARED STATEMENT OF JOHN P. FRANK, SENIOR PARTNER, LEWIS & ROCA LAW FIRM, PHOENIX, AZ, ON BEHALF OF THE ARIZONA STATE BAR ASSOCIATION

My name is John P. Frank and my law firm is Lewis and Roca, Phoenix, Arizona. Throughout the 1970s and 1980s, I have been a participant in all hearings in either the House or the Senate on diversity jurisdiction and was chairman of the Committee to Maintain Diversity Jurisdiction, a group of prominent lawyers, in years gone by. I have at all times represented the Arizona State Bar, and continue to do so; and in one of the previous hearings, the Committee to Maintain Diversity Jurisdiction represented all 50 state bars.[1]

Because of the shortness of time between the announcement of this hearing and the event itself, it has been impractical to poll all the bar groups. However, the ABA is here to oppose this measure. I am authorized to say that ATLA, which has opposed all measures in the past to limit the diversity jurisdiction continues its positions and opposes this measure. The American College of Trial Lawyers in the past has opposed efforts to limit diversity jurisdiction. Its proper authorities could not be polled in advance of this hearing, but I am authorized to say that Mr. Francis Fox, who has been chairman of its committee on procedure, opposes the proposals now before this body.

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[1]Two parallel articles of mine are *For Maintaining Diversity Jurisdiction*, 73 Yale L.J. 7 (1963) and J. Frank, *The Case for Diversity Jurisdiction* 15 Harv. J. Legis. 403 (1979).

To repeat, it has not been possible due to the shortness of time to achieve a full survey of the bar of the country, but I am confident that I can say with assurance that the bar overwhelmingly would regret any diminution of this jurisdiction; and, on the basis of my extensive contacts over the years with many district judges on this subject, there are many of them as well who would prefer to keep the pleasant variety which an occasional diversity case gives to the general run of criminal, Social Security, or other often routine matters which load their dockets.

I. Background on Policy

Historically, the Act of 1789 made citizenship of different states the number one heading for the civil jurisdiction of the federal courts. Until 1875, this was, for practical purposes, the only private civil jurisdiction.[2]

This resulted in an existence of two court systems in each state, the state and the federal, which could deal with the same case, and for a time that system put a premium on manipulation of the systems for results. The classic denunciation is that of Justice Holmes in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[3] This disparate quality of results for the party who had the option of going to the federal court on occasion and having the case decided other than it would be by the state was outrageous and led to a tide of anti-diversity sentiment in the 1920s and 1930s. This tide

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[2]J. Frank, *Historical Bases of the Federal Judicial System*, Winter, 1948 Law & Contemporary Problems 3.

[3]276 U.S. 518 (1928).

stemmed intellectually from the seminar of Professor Frankfurter at the Harvard Law School.

The diversity jurisdiction was justifiably criticized. There could be two conflicting bodies of substantive law, one federal and the other state, giving the party with the option of choosing his court a chance to choose his law as well, and this was legitimately criticized. As a young man, I supported abolition of diversity jurisdiction for that reason.

But then came the dawn in the form of *Erie Railroad Co. v. Tompkins*.[4] Once it was established that the law should be the same in both systems, the manipulative quality of the jurisdictional choice evaporated. From then until now the result of the choice of forum moved from what the professions had felt to be an unfair advantage to legitimate advantages: the pace of the docket, the procedure applied, the quality of the available judges, and so on. *Erie* eliminated the fundamental flaw in the diversity system.

The subsequent criticism of that head of jurisdiction, led by Chief Justice Burger and Representative Robert Kastenmeier, former chairman of their subcommittee, switched to other grounds. The argument made now is overwhelmingly that the federal courts are too busy to handle the diversity cases; that somehow those cases are beyond the pale of intellectualism worthy of a federal judge; that this whole load can safely be dumped on the state courts. The argument becomes that the resolution of a difficult contract controversy, or of tough problems in products liability, or the aftermath of an airplane crash, are

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[4]304 U.S. 674, 58 S. Ct. 817, 82 L. Ed 1188 (1930).

not on the same level of worthiness as, say, an interpretation of the Internal Revenue Code or the resolution of some issue in Social Security.

The proposals to cut the federal jurisdiction by eliminating or markedly reducing diversity, earnestly presented though they are, have failed because, to return to the beginning, the bar continues to like diversity jurisdiction and to support it. The ABA and ATLA have emphatically opposed the elimination of diversity.[5] The American College of Trial Lawyers has opposed elimination and, as noted in 1978, so did 50 state bars.

The fundamental value of diversity jurisdiction, and this applies equally to the in-state plaintiff cases, is that it is one of the oldest and best social services of the federal Government. The original federal court jurisdiction was almost entirely permissive; the Congress was under no obligation to create federal trial courts at all, and could have left all original matters except those in the Supreme Court to the states. And yet the Constitution did permit the creation of federal diversity jurisdiction, and the first Congress did choose to take up the option. It granted jurisdiction for private, civil cases in diversity only. The only other federal service of this antiquity is the postal service.

The first tangible value of diversity is its disposition of some 50,000 cases a year.

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[5]In the hearings before the Committee on the Judiciary, U.S. Senate, 96th Congress, First Section on S. 679, Prof. John Reed of Michigan, speaking against the abolition of diversity, said of diversity, "It is not a luxury, it is not a negative thing. It is, as we called it in our statement, a condition of justice," p. 155. Prof. Reed developed the "rich interchange of ideas" between the state and federal systems which diversity encourages in much the ways that I have advanced the same argument.

II. Burdens and Comparative Burdens

The fundamental argument for eliminating in-state plaintiff jurisdiction is the assumption that somehow this would relieve the federal courts of some significant burden. It is fully recognized that the federal courts are overburdened and that the Congress, in the course of federalizing what had otherwise been state matters, is adding very materially to that burden. Hence, the precise dimension of the diversity burden needs to be assessed so that a conclusion may be drawn as to the value of that burden.

Unfortunately, if there are any statistics breaking down diversity as between in-state plaintiffs and other cases, I do not have them. Perhaps the Committee has such data, but since I do not, I am compelled to talk about the diversity cases as a whole. The in-state plaintiff cases are something less than that whole.

The short of it is that the diversity cases are not much of a burden and, relatively speaking, a diminishing burden at that. Again, as is commonly understood, the number of diversity cases which reach the appellate courts is quite small. In 1992, the total of all appellate cases was about 32,000 and the number of diversity cases was 3,000.[6] The total appellate load was broken into about 21,000 civil cases and about 11,000 criminal cases. Of those civil cases, the total percentage of diversity cases is under 15%.

At the trial court level for 1992, the total number of civil filings was about 231,000. Of these, the U.S. cases were about 62,000, the private federal

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[6]Unless otherwise noted, all statistics are taken from the 1992 report of the director of U.S. Courts and have been rounded for convenience.

question cases were 118,000, and the diversity cases were 49,000. The hard fact is that since I wrote on this topic in 1978, the number of civil cases generally has doubled, but the number of diversity cases has not significantly changed; this is, proportionately, a receding head of federal jurisdiction.

In terms of the bearing of diversity cases on the total trial burden of the federal district courts, the burden is very light. Of the 111,000 federal questions cases terminated in 1992, 4,000 were disposed of during or after trial. For the same period of time, 57,000 diversity cases were terminated, approximately half as many as the federal question cases, and the number which were terminated during or after trial was 3,000. Of those diversity cases, 13,000 were terminated with no court action, which presumably means that the great bulk of them were settled by the parties on the pleadings. 41,000 were terminated before, during, or after pretrial, again, presumably almost entirely by settlement. Again, we do not know how many of these diversity cases were in-state plaintiffs, but taking all of the diversity cases, this is not a very large sector of the federal jurisdiction and it is not increasing either numerically or proportionately. With great deference to this conscientious Committee, this bill seeks to solve a problem which does not exist.

In the course of achieving that solution, the Committee's action would create a greater problem. Necessarily the practical result in moving the diversity cases out of the federal system is to move them into the state systems. As I have been inelegant enough to say before, in an often quoted passage, the manure is going to smell the same no matter which pile it is on. But the state piles are much bigger.

I know that it is the common response that the number of diversity cases is proportionately small when it is spread over the state systems, and that it will not make much difference. The answer is that the spread will make a very great deal of difference, a very tangible difference to the people involved.

Let me be as concrete about this as I can. We will have to make some apples and oranges comparisons here, but this Committee will get the idea. Unfortunately, the National Center for State Courts does not keep statistics on the length of time it takes for a case to move from filing to disposition in the various states. However, in preparation for this appearance, I have obtained the figures for the two busiest New York areas, Manhattan and Brooklyn, which equate to the Southern District and the Eastern District of New York on the federal side; and from Cook County which equates to the Northern District of Illinois; and from San Francisco and Los Angeles/Orange County which equate to the Northern and Central Federal Districts in California. Those figures can be compared, at least in kind of a way, with the figures in the Administrative Office report. The result is extremely discouraging.

Specifically, in Chicago the average time from filing to closing on civil jury cases in 1993 was 56.7 months.[7] This is almost five years. If we compare that with the median time predictions in the Northern District of Illinois (in other words Chicago state to Chicago federal) the median time is 4 months. In the federal Northern District, only 10% of the cases took more than 21 months.

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[7]Telephone report from Mr. James O'Donnell, Illinois State Administrative Office.

Chicago has more than 50% of all the federal cases in Illinois and it is far faster than every district but one in the Seventh Circuit.

I have acknowledged that this is an apples and oranges comparison because I am comparing the federal median with the state jury trials, but as these figures show, Chicago in the Northern District is moving even its longest cases far faster than the state system.

The same results are true in the great cities of both coasts. In the Southern District of New York, the median time for all civil cases is 8 months, and in the Eastern District it is the same.[8] On the state side, the State Administrative Office has no comparable figures; it does not keep time from filing to disposition. It does have 1993 data, the Notice of Issue, or ready date, to disposition -- in other words, well into the case. The median in Manhattan was 295 days, or 10 months, and in Brooklyn it was 498 days, or 17 months. These are hard to compare, but permit the generalization that these enormous New York state courts are far behind the parallel federal courts in disposing of business.

So also with San Francisco and Los Angeles. In the Northern District (San Francisco) the median time is seven months and in the Central District (Los Angeles) the median is 8 months. On the state side, the normal time from filing to disposition in San Francisco in 1991 was 22 months, in Los Angeles was 25 months, and in Orange County, 60% were over two years.[9]

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[8]The New York figures come from Ms. Martha Perez of the New York Court Administrative Office.

[9]The figures are from Mr. Ron Titus of the California Administrative Office.

Permit me to return to the fundamental theme. Dispute settling is a basic service which the federal Government has offered its people in diversity situations since 1789. It is a service like carrying the mail, providing for the national defense or assisting to settle labor disputes, or assisting agriculture. It is only a moderately expensive service as these things go. To deny the service will force some unknown portion of 50,000 cases to give up the federal forum. We don't know the number of people involved, but it could well be into the hundreds of thousands. The most immediate practical consequence to those people is to force them to wait much longer -- in many cases years longer -- for the disposition of their disputes.

I am not here preaching the cult of the superman, arguing that all federal judges are abler than all state judges, or even that most of them are. I say only that many thousands of Americans believed that they would be better off in the federal court than in the state court. This may have been because their views of quality, it may have been because of their views of timing, it may have been because of some wholly different reason. The point is that for more than two centuries, those people and their ancestors before them have been entitled to make that choice. They should not be deprived of that option now.

Mr. HUGHES. Mr. Dolin, welcome.

STATEMENT OF MITCHELL F. DOLIN, CO-CHAIR, FEDERAL LEGISLATION COMMITTEE, AMERICAN BAR ASSOCIATION'S SECTION OF LITIGATION

Mr. DOLIN. Thank you, Mr. Chairman. As Mr. Frank correctly points out, the organized bar has consistently spoken with one voice on the larger issue of elimination of diversity jurisdiction and on this subissue of eliminating in-State plaintiffs diversity, so I will be very brief in my statement.

I am grateful for the opportunity to appear here today on behalf of the American Bar Association to address this pending legislation. For the record, the ABA, along with the American Trial Lawyers Association, and the American Corporate Counsel Association, opposes H.R. 4357 and H.R. 4446.

For more than 200 years, since the ratification of the Constitution and the enactment of the Judiciary Act of 1789, diversity jurisdiction has well-served the ends of justice in this country. The ABA believes, as a matter of policy, that diversity jurisdiction should not be reduced or eliminated in the absence of a compelling demonstration of a need for change. The ABA respectfully submits that the proponents of change have not made that showing.

The pending bills, by focusing only on in-State plaintiffs diversity, appear on the surface to be less extreme than total elimination of diversity jurisdiction. Despite this appearance, however, we believe that the pending bills have the same basic defects as would total elimination of diversity jurisdiction.

The principal argument we have heard today in favor of the pending bills is that they would eliminate diversity jurisdiction for a small class of plaintiffs, least in need of the Federal forum, and that they would relieve the strains on the Federal system without swamping or overburdening the State court system.

The ABA takes issue with both prongs of this argument. The ABA believes that in-State plaintiffs, like out-of-State plaintiffs, are equally entitled to the benefits of diversity jurisdiction. This is a proposition first recognized by Congress in 1789.

Diversity jurisdiction shields litigants, be they in-State or out-of-State, from localized prejudices. It places before the Federal courts questions of national importance, and diversity jurisdiction fosters an important, if not critical, dialog between the State and Federal systems on matters of common interest.

If jurisdiction is eliminated for in-State plaintiffs, the benefits of the Federal forum, many of which have already been mentioned, will be denied to the plaintiff without the financial wherewithal to pursue litigation out of State.

Of course the option of moving out of State to get into Federal court will be available to some plaintiffs, but only to those with the financial means.

The Federal burden argument, while describing a situation with which the ABA is quite sympathetic, is overstated when it comes to diversity jurisdiction. Diversity jurisdiction cases account for only 22 percent of all civil filings in the Federal district courts.

If one includes the criminal matters in the count, the percentage of diversity cases out of the whole is well under 20 percent. In raw

numbers, diversity cases, which peaked at approximately 70,000 a year, are now down to approximately 50,000 a year, largely as a result of Congress' action in 1988 of increasing the amount in controversy requirement from $10,000 to $50,000.

So we have a situation, at least over the last 5 years, in which diversity cases have become a smaller percentage of the Federal civil docket, and indeed have decreased in raw numbers from 70,000 to 50,000.

As we have heard already today from Judge Marcus, as well as from some of the members of the subcommittee, among the leading causes of Federal court congestion is not diversity jurisdiction, but the increased criminal caseload in the Federal courts.

We also have problems of unfilled judicial vacancies in the Federal courts and the creation of new Federal causes of action and new Federal crimes. When you look at all of the major causes of Federal court congestion, it becomes clear that curbing diversity jurisdiction is no solution to the problem.

Finally, if these cases are shifted from the Federal courts to the State courts, we have to deal with what sort of strains this legislation would put on the State courts. Now, indeed as Judge Marcus says, the in-State plaintiff diversity filings are less than the whole. We know that the whole is roughly 50,000 diversity cases a year. The in-State plaintiffs are something less than that whole.

The only quantitative study that I have seen, however, that analyzes the potential effect of this type of legislation on the State courts, concludes that eliminating in-State plaintiffs diversity might be as burdensome on the State courts as total elimination of diversity.

And the main reason for that is, the authors of this quantitative study conclude, that in-State plaintiffs diversity cases tend to have higher amounts in controversy, tend to be a bit more complex, and tend to be a bit less amenable to settlement.

So this legislation that is before us today, which on the surface appears to spare the State courts of incredible burdens, could actually do just that. And as my good colleague, John Frank, observed many years ago, if the proposed solution is to move cases from a Federal logjam to a State logjam, we are compounding problems.

For all of these reasons, the ABA respectfully submits that the proposed bills would have an adverse effect on the administration of justice.

That concludes my prepared statement. Thank you very much, Mr. Chairman.

Mr. HUGHES. Thank you very much, Mr. Dolin.

[The prepared statement of Mr. Dolin follows:]

Prepared Statement of Mitchell F. Dolin, Co-Chair, Federal Legislation Committee, American Bar Association's Section of Litigation

Mr. Chairman and Members of the Subcommittee:

My name is Mitchell F. Dolin, and I am a practicing attorney in Washington, D.C. I am Co-Chair of the Federal Legislation Committee of the American Bar Association's Section of Litigation. I have been designated by the ABA's president, R. William Ide III, to present the Association's position on proposed legislation to eliminate diversity jurisdiction in the federal district courts for lawsuits filed by plaintiffs in their home states.

The legislation in question is H.R. 4357, which was introduced on May 5, 1994, and H.R. 4446, which was introduced on May 18, 1994.[1/] These bills would eliminate diversity jurisdiction for an "in-state plaintiff," but permit an out-of-state defendant to remove a diversity action filed in state court by an in-state plaintiff. My testimony will focus on the "in-state plaintiff" proposal and will not canvass various other proposals, past and present, to limit the availability of diversity jurisdiction.

We at the ABA welcome these hearings as an opportunity to bring the expertise and experience of the organized bar to this issue. As a preliminary matter, I would like to emphasize that the Association's position on legislation that would eliminate or limit diversity jurisdiction is one of long standing. In June 1978, the ABA formally adopted its position opposing the elimination of diversity jurisdiction in general and the elimination of diversity jurisdiction for in-state plaintiffs in particular.

1/ Section 305 of H.R. 4357 and H.R. 4446 are similar in effect; the main difference is that under H.R. 4446 diversity can be invoked as long as any plaintiff is a non-resident, while under H.R. 4357 diversity can be invoked only if all plaintiffs are non-residents.

Since 1978, the ABA has adhered to that position and continues to do so today. We therefore oppose H.R. 4357 and H.R. 4446.

For more than 200 years, diversity jurisdiction has well served the ends of justice in America. Congress should not alter that jurisdiction in the absence of a compelling demonstration of a need for change. The ABA believes that the proponents of change have not made, and cannot make, that showing.

Efforts to eliminate or curb the scope of diversity jurisdiction are not new. The ABA and the vast majority of the organized bar, including the American Trial Lawyers Association, the American Corporate Counsel Association, and all fifty state bars, have steadfastly opposed efforts to eliminate or curb diversity jurisdiction, including efforts to eliminate jurisdiction for in-state plaintiffs. While the ABA has supported modest changes in the scope of diversity jurisdiction, including the increase in the amount in controversy from $10,000 to $50,000 enacted by Congress in 1988, changes such as that embodied in the pending bills have been repeatedly examined and rejected both by the bar and by Congress.

The arguments for and against legislative change are by now familiar to the members of this Subcommittee. Those who propose the total elimination of diversity jurisdiction rely most heavily on two arguments: that the fear of local prejudice originally justifying diversity jurisdiction is a vestige of the past; and that elimination of diversity jurisdiction would relieve our overburdened federal courts. Those who favor retention of diversity jurisdiction dispute the premise that localized

prejudices have disappeared and believe that there are better ways to lessen the burdens on our federal system than to shift that burden to our overtaxed state courts.

It bears emphasis that elimination of diversity jurisdiction for in-state plaintiffs implicates different arguments from proposals to eliminate diversity jurisdiction entirely. Those who propose elimination of in-state plaintiffs' diversity jurisdiction tend to argue from narrower grounds; they argue: (1) that although local bias may persist, a plaintiff suing in his or her home state need not fear such bias; and (2) that elimination of diversity jurisdiction for resident plaintiffs is a moderate change that would alleviate the federal caseload burden without swamping the state courts.

The ABA submits that, while the pending bills appear to be less extreme than total elimination of diversity, they have the same basic defects and in some ways would have consequences even more untoward than total elimination.

The argument that in-state plaintiffs are not entitled to a federal forum in their home states because they need no protection against localized prejudices is both untrue and beside the point. The fact is that many in-state plaintiffs seek a federal forum in their home state to escape real or perceived state-court bias.[2/] For example, a local plaintiff suing an out-of-state corporation might nonetheless be the victim of local bias if the corporate defendant is the major employer in her small town.

[2/] According to a survey conducted by Neal Miller of the Institute for Law and Justice, 22.4% of defense attorneys surveyed stated that plaintiffs face some sort of bias in state court. Neal Miller, An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction, 41 Am. U. L. Rev. 369, 408 n.149 (1992).

Similarly, an in-state plaintiff – by virtue of minority-group status or otherwise – may be much more out of step with local folkways and sympathies than the out-of-state defendant. Federal court would provide such plaintiffs access to a jury venire drawn from a broader geographical range, one that may be (or perceived to be) less beholden or sympathetic to the defendant. Thus, while we tend to assume that the non-resident defendant is the only party that needs protection from local prejudices, this is not always the case.

In any event, the argument that in-state plaintiffs need no refuge from local prejudice misses the mark for a more fundamental reason; it incorrectly assumes that avoidance of local prejudice is the only justification for diversity jurisdiction. In fact, quite little is known about why diversity jurisdiction was provided for in the Constitution and the Judiciary Act of 1789.[3/] If protection of non-resident defendants from geographical prejudices had been the only rationale for diversity jurisdiction, it would be impossible to explain why in-state plaintiffs have been permitted to invoke diversity jurisdiction since the enactment of the Judiciary Act of 1789.[4/] The benefits of diversity jurisdiction are many and transcend concerns about geographical bias. Diversity jurisdiction brings to the federal courts questions of national importance; indeed, as one federal judge has recently observed, the "demonstrable need for a federal jurisdiction in major matters affecting interstate commerce . . . alone should justify its

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[3/] See generally 1 James W. Moore, et al., Moore's Federal Practice ¶ 0.71[3.-1], at 709 (2d ed 1993).

[4/] See Richard A. Posner, The Federal Courts: Crisis and Reform 141 (1985).

continued existence."[5/] Diversity jurisdiction also facilitates an important dialogue between the state and federal courts by which each system learns from the other in connection with procedural and evidentiary rules, as well as matters of substantive law. It also preserves a citizen's access to justice and provides an alternative forum well worth its costs. Aside from complaints about the burdens that diversity cases may impose on the federal courts, there appears to be general satisfaction with the manner in which the federal courts handle diversity cases.

Eliminating in-state plaintiffs' diversity jurisdiction would deprive litigants of important federal innovations. For instance, the machinery now available under Section 1407 of the Judicial Code (28 U.S.C. § 1407) for pretrial consolidation of multidistrict litigation ("MDL") involving mass disasters and mass-tort situations applies only to cases in federal court. One need look no further than the MDL proceedings in Alabama concerning breast-implant claims and the MDL proceedings in Philadelphia relating to asbestos claims to appreciate the benefits of permitting in-state plaintiffs access to a federal forum. Similar benefits, actual and potential, are facilitated by nationwide class actions in the federal courts. In addition, some very recent federal innovations, such as the 1993 changes in the Federal Rules of Civil Procedure regarding pre-trial discovery and the plans of individual districts pursuant to the Civil Justice Reform Act of 1990, promise to streamline the pre-trial process for all civil cases in the federal district courts.

[5/] Charles A. Brieant, Diversity Jurisdiction: Why Does The Bar Talk One Way But Vote the Other Way With its Feet, 61 N.Y. St. B.J. 20, 21 (1989).

If congestion in the federal courts is the problem, the solution is not to limit the public's access to the system by reducing the scope of diversity jurisdiction, especially when that jurisdiction is serving a useful purpose in our society. Diversity jurisdiction should not be blamed for the fact that many federal courts are crowded.

In the recent past, diversity cases have tended to account for approximately twenty-five percent (25%) of the annual civil case filings in the federal courts. According to the most recent 1993 statistics published by the Administrative Office of the United States Courts, diversity cases accounted for only twenty-two percent (22%) of civil filings, and less than nineteen percent (19%) of all filings. Prior to the 1989 effective date of the increase in the amount-in-controversy requirement, diversity cases accounted for nearly twenty-nine percent (29%) of the federal civil docket. In terms of annual filings, diversity cases are down from approximately 70,000 in 1988 to approximately 50,000 in 1993.

Diversity-related strains on the federal system have thus been significantly reduced during the past five years. Congestion in the federal courts comes from many other sources, including the increased criminal caseload, the statutory creation of new federal causes of action and crimes, unfilled judicial vacancies, population growth, and the increasing litigiousness of the American public and its government. Curtailing diversity jurisdiction is no panacea if the problem at issue is federal court congestion.

Moreover, any perceived benefits of relieving federal burdens by eliminating federal jurisdiction for in-state plaintiffs would be more than offset by the

burdens that would be imposed on our state judicial systems. The argument that diversity cases should be shifted from the federal courts, which are overburdened, to the state courts, which can easily absorb them because of the state system's collectively larger capacity, is an inaccurate over-simplification. Some federal districts are not overburdened, while some state courts are so overburdened that it takes several years to get a case to trial. Obviously, justice will not be served by "transferring cases from one logjam to another."[6/]

In 1992 alone, 93 million cases were filed in state trial courts, 20 million of which were civil cases. Since 1985, civil caseloads in the state courts have increased by thirty percent (30%). In 1992, filings per federal judge totalled 1,238 while filings per state judge totalled 3,365; for civil and criminal cases, filings are increasing much more rapidly in the state courts.[7/] In many urban areas, including Houston, New York City, and Pittsburgh, the median time from filing to disposition is much higher in state court than in federal court.[8/]

Although we obviously cannot predict with certainty how many cases will be shifted from federal to state court as a result of the pending bills, indications

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[6/] John P. Frank, The Case for Diversity Jurisdiction, 16 Harv. J. on Legis. 403, 405 (1979).

[7/] State Justice Institute, State Court Caseload Statistics: Annual Report 1992 (Feb. 1994).

[8/] Administrative Office of the United States Courts, 1992 Federal Court Management Statistics (Washington, D.C. 1992); John A. Goerdt, Reexamining the Pace of Litigation in 39 Urban Trial Courts 39 (Williamsburg, VA: National Center for State Courts, 1987).

are that the numbers will be substantial and that those cases will impose a substantial burden on the state courts. The most recent quantitative study of this issue of which we are aware concludes that "barring in-state plaintiffs from filing diversity cases in federal court would impose a disproportionate burden on state courts" and "might be nearly as much of a burden on state courts as would be total abolition of diversity jurisdiction."[2/] Since federal court diversity cases are on average more complex and time consuming than state court cases, transferring cases from the federal courts will impose burdens on state courts that they are not as well equipped to handle. For example, the transferred cases will involve higher amounts in controversy, so they will be more complex and less susceptible to settlement. Furthermore, states courts would have to deal with additional complex multiparty litigation, but without access to federal procedural mechanisms. By combining the unprecedented burdens our state courts are facing today with the added burden of having to deal with complex new cases, enactment of H.R. 4357 and H.R. 4446 would greatly increase the problems faced by our state courts.

The pending bills would also have undesirable consequences for litigants and the federal courts. The practical effect in many cases would be to deprive an injured individual of access to the federal court in his home state even though his interest would be better served in federal court. The alternative of initiating litigation in an out-of-state federal court, which will be pursued by some plaintiffs, will be

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2/ Victor E. Flango & Craig Boersema, Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads, 15 Dayton L. Rev. 405, 455 (1990).

unavailable to poorer litigants. In cases where that step is taken, all that will be accomplished is to increase the cost of litigation and inconvenience both the witnesses and the parties. Moreover, a substantial diminution in the scope of diversity jurisdiction would reduce the number of lawyers with experience in both the state and federal courts; this would have the undesirable consequences of limiting the public's choice of lawyers familiar with federal practice and increasing the costs of legal services to the public.

* * *

The current system of coordinate federal and state jurisdiction is an important part of our federalism that we should not lightly abandon. No one has yet come forward to assert, much less to demonstrate, that diversity jurisdiction, which is provided for in our Constitution and which has been with us since the Judiciary Act of 1789, has ever resulted in any injustice to any litigant. For the reasons I have expressed, the ABA believes that abolition of diversity jurisdiction for in-state plaintiffs would have a serious, adverse effect on the administration of justice in the United States.

Mr. HUGHES. The Federal-State Jurisdiction Committee in its report to the Judicial Conference states that the original justification for in-State diversity jurisdiction was to, and I quote, "act as a prophylactic against State court bias in the enforcement of debts."

Do you reject that thesis?

Mr. DOLIN. I am going to defer to Mr. Frank who has written very learnedly on this topic, but my understanding is that if you go to the original sources, the original sources in the Constitution and the Judiciary Act, there is precious little said about why this head of jurisdiction was provided for in the Constitution.

We do know from 19th century Supreme Court cases interpreting the diversity grant that various justifications are described. But if we are looking for an original understanding, if you will, we know precious little.

We know that this is one of the benefits that diversity jurisdiction gave to a growing country. But I am, for one, basing what I say on the benefits of diversity that are enduring today.

Mr. HUGHES. Mr. Frank, do you quarrel with that conclusion?

Mr. FRANK. Mr. Chairman, I say, and I hope without ostentation, that probably the leading study on the history of Federal jurisdiction in the Constitution is an essay of my own which is cited in the formal paper that you have before you. I think with deference to other speakers, that we really don't know. They just tucked it in at the Constitutional Convention. You don't find much there.

In Elliot's debates, it didn't get a lot of attention. It is pretty hard to know as of 1787 or 1788. I think we can assume, surely, that interstate prejudice was a factor. It was an economy that was worried about collecting the bills and a fear that the State courts would not collect the bills.

The argument that I make is really not based on that historical factor at all. It is the fact that in 200 years—I repeat the sentence if I may—this has become a valuable social service of the Federal Government.

Mr. HUGHES. I understand that.

Mr. FRANK. And historically it is open to doubt. I am not sure.

Mr. HUGHES. The fact of the matter is, times have changed. We have to take a look at old policy and see whether it makes sense today. That is why the Constitution has served us so well over the last 200 years.

We have to keep looking at principles and see whether they make sense in contemporary problem solving. The Federal-State Committee also stated that the use of the in-State plaintiff diversity jurisdiction allows a plaintiff to file a claim in Federal court based on State law, but then bypasses the State court system. It believes that it is bad judicial administration, bad policy.

What is your observation on that?

Mr. FRANK. No, by definition, since *Erie* v. *Tompkins,* all of the cases, they are all based on State law.

If they were based on Federal law, they would be Federal question cases and we would not have this problem. So is there nothing that gives more of a State law wrinkle to the in-State plaintiff's case than to any other diversity case. They are identical in that respect.

Mr. HUGHES. In Judge Marcus' statement, he estimates that only about 8,000 new cases per year would be eliminated if the in-State plaintiff diversity jurisdiction was changed.

Mr. Dolin, in your written statement you indicated that there were 20 million civil cases filed in State trial courts in 1992.

Mr. FRANK. I surely misspoke if I used that figure.

Mr. HUGHES. No, no, Mr. Dolin basically used that figure, and my question is, will not the elimination of ISP at the Federal courts have a rather limited impact on the State courts?

Mr. DOLIN. I think that number, which is a very large number, comes from State Justice Institute figures, and it includes a lot of matters that would never get near a Federal court door, very small claims matters. That figure would include small claims matters of every sort.

As I said during my prepared statement, Mr. Chairman, the types of cases that we would be shifting from the Federal system to the State system are among the most complex and time-consuming cases that the State system is accustomed to being presented with.

And the State system lacks a lot of the procedural mechanisms and the devices that the Federal system has to deal with them; mass tort and other complex cases, which the Federal courts have been coping with heroically through MDL proceedings and the like. Those sorts of devices are unavailable at the State level.

As a general matter, the types of diversity cases we would be sending to the State courts have higher amounts in controversy, are much more complex, and require the sort of attention that the run of the mill State court cases do not foist on a judge.

Mr. HUGHES. I know you cite a study in your statement that supports that premise, but what kind of empirical data are there that would suggest that we would not be saving anything because of the complexity of the cases that are involved?

Can you give me any data?

Mr. DOLIN. Mr. Chairman, the study to which I was referring is authored by Victor Flango and appeared in the Dayton Law Review in 1990, and it is based on quantitative research.

I would only add to that that one of the problems with shifting cases from the Federal courts to the State courts, which Mr. Frank mentioned, is that the concentration of these cases could very well be in particular jurisdictions that are grappling with the sorts of delays that we see in Cook County State courts and other urban State courts.

Mr. HUGHES. Let me ask you, as a matter of policy, do you think that we should premise Federal jurisdiction on the basis of the length of time it takes to reach trial in the State courts?

Shouldn't we really be attempting to address that within the State system and reduce that backlog?

Mr. FRANK. Is that addressed to me, sir?

Mr. HUGHES. Yes, to you.

Mr. FRANK. I think definitely yes. Please at least give thought to the view I am expressing that what we are talking about is a genuine social service provided by the Federal Government.

People have disputes. The disputes have to be settled. Settling disputes whether you do it by rent-a-judge or State courts

or Federal courts, somebody has got to perform that function in a civilization.

And as a social service, of course, you have to take into account, as you do with every other social service, how it can be efficiently delivered. And the plain fact is that, particularly in the areas which Mr. Moorhead and Mr. Edwards are acquainted, I don't know about New Jersey, you are going to hurt a lot of people.

You are going to deprive people of a social service being rendered if you adopt this legislation because you are shoving them from what is already a turgid and hard-to-move mass into an impossible to move mass, and that is a sorry thing.

Mr. HUGHES. Well, your argument, and you have made it several times, is that we perform a social service. We are basically providing a service to in-State plaintiffs in civil cases.

Don't we, by the same token, discriminate at the same time against in-State defendants? Why not make that social service available to everybody?

Mr. FRANK. Your Honor—forgive me, the "Your Honor" part. I get used to being in the courthouse.

Mr. HUGHES. That is the nicest thing I have heard all week.

Mr. FRANK. Mr. Chairman, if there were a way constitutionally of broadening the Federal jurisdiction, I would be all for it, but please don't take away what we have.

Mr. HUGHES. How did I know that you were going to say that? I understand all the reasons why the ABA and the State bar associations like it. They like it because it provides obviously another forum. I understand that.

But I am not so sure that I am persuaded by an argument that basically the State systems are so clogged. That is what I hear also about expanding Federal jurisdiction. It is because of the frustration that we are not solving the crime problem, so we need to federalize the crime problem to basically solve it. What we should be talking about is what is good policy.

What is good policy? That is the issue. What is good federalism? In that regard, it seems to me that the largest argument today is we have always done it that way, so we continue to do it. We like it, so we should continue to do it. It is a system we like.

Besides, if you throw us back into the State systems, it is going to take us more time to reach trial. That is hardly, it seems to me, a sufficient basis on which to premise policy.

Mr. Frank, you are very interested in good policy. I know, both of you are. I don't mean to suggest you are not, Mr. Dolin, but that is in essence what I hear.

Mr. FRANK. Mr. Hughes, respectfully we chatted about this in your chambers and I suspect we have to recognize that a certain gulf exists here, and probably my chance of persuading you is equal to my pushing a peanut up Camelback Mountain in my home State with my nose.

Mr. HUGHES. I don't know. Your chances went up when you referred to my office as my chambers.

Mr. FRANK. I put a little more spin on that. I simply can't improve what I said. I must let it rest at that. That the complete bar of the country—and I think you will take our word for it, that we really, all of us, all of the people in litigation overwhelmingly come

to you and say, please don't tinker with our diversity jurisdiction. That there ought to be a pretty good reason for doing it.

And if I might put it cruelly, the fact that some of your colleagues have gotten the steam shovels and dumped 100 million cocaine cases, which shouldn't be in the Federal courts, is no good reason for taking away from the Federal courts and taking away from the citizenry a valuable functioning social service which works very well.

Mr. HUGHES. You are absolutely right. That is another reason why our dockets are congested. There is no relationship whatsoever.

But I hear the same arguments for expanding jurisdiction for federalizing State crimes. We should be deciding these issues on the basis of what is good policy, however. I hear my colleagues in the bar back home. They are adamantly opposed to abolishing ISP diversity jurisdiction.

If I were trying to make friends and influence people in my district, I would not be holding this hearing.

Mr. FRANK. The nice thing about retiring is at least you can stop worrying about that.

Mr. HUGHES. I voted to do away with diversity jurisdiction a long time before I announced my retirement.

Mr. FRANK. I know that, but I remind you that the vote of the committee was 26 to 6, whatever it was, it was a disproportionate number, and I say that with full respect for your staying power.

But with—and let me not be jocular. The fact that the total bar of the country feels very strongly about this, as is reflected indeed in the circumstance of the heavy vote the last time the general topic was in this body, reflects that we have here a system which the users of the system regard as working pretty well.

And you do face in any legislation the question of why should we tamper with an ongoing, well-working system? What is the improvement we are making here? And why don't we just leave it alone? And I respectfully submit that that is this.

Mr. HUGHES. Well, thank you. I appreciate that. As always, you are a very articulate advocate for all the causes you undertake.

And while we may differ on this particular issue, we are of like mind on so many, many other issues. It does matter that the organized bar feels so strongly about it. I have great regard for the organized bar. It is a difficult issue.

The gentleman from California.

Mr. MOORHEAD. You know, after having practiced law for half of my adult life, I think I know what the average lawyer feels like, and most of them don't care about this issue very much.

I know some of the big firms do, and I've talked to them, the people I work with are lawyers and so they, for the most part—I think pretty much know what is important to them.

But it is not fair to say just because you can get a diversity issue, you should be able to get to trial faster or that crowding the State court is a reason to take it to Federal court.

Now, you will find a reason that I will buy, but that is not one of them, because what are you going to do about all the others? Are we going to leave the State courts inferior to the Federal courts as

far as ability to get cases through? Because that is where most lawyers practice most of the time, in the State courts, not the Federal court.

Very few of them practice a whole lot in the Federal court. And we have to find some way to preserve the quality of the Federal courts.

I have one suggestion here, and would like to see what you say about it. One of the suggestions of the Federal Court Study Committee was that they felt that diversity should be abolished, but one of the suggestions that was made was that the jurisdictional minimum be increased from $50,000 to $75,000, and indexed as far as the value of money is concerned as we go down the line. That would be one way that you can at least limit it to some of the more major of cases.

I know it took us 50 years to move from $10,000 to $50,000. I don't think that it is doing the average person any big favor to take them to Federal court on a $50,000 case because of the costs and the additional attorney's fees, and all of the other things that you run into.

I know when you live in Scottsdale at the base of the Camelback Mountain, you are very close to the Federal court in Phoenix, but not everyone in the country is. Many of them are long distances from it.

What would you think about raising it to $75,000 and indexing it? I don't think that the majority of members of the bar association in the country would object to doing that, because not many of them use that, really.

Mr. FRANK. Mr. Chairman, may I respond only slightly jocularly? Last time when I was the principal spokesman for the bar of the country on this subject, and after the House committee has voted, the chief staffer for the then chairman came to me and said, will you agree to $50,000? And I said, I will make you a deal, I will agree to $50,000 if you agree that this subject is not going to come up again for the balance of the 20th century.

Mr. MOORHEAD. Nobody can guarantee that.

Mr. FRANK. And here we are in 1994, and now we are shoving it up again. I will be dug in solid for whatever good it does and resist any jiggling of the amount.

Let me reach it, if I may, in terms of what Mr. Hughes was saying.

What we are getting is what you said before, that there are people who are opposed to diversity altogether. And since they haven't got the votes or the capacity to abolish it altogether, we get the nicks and the nacks and the snippets at the edges, and we get the proposal to up the amount.

And in as far as that reflected the views of the bar, we don't want diversity tampered with at all. We want to keep the system disposing 50,000 cases a year, and we would like to stand pat and do not wish to see it modified. You have the power. You have the decisionmaking and you have the responsibility. If you want to do it, you are going to do it.

Mr. MOORHEAD. Mr. Frank, you have to understand with either Mr. Hughes or myself or other members of the committee, this is not an issue we go out and win votes on or that people are excited

about. We only want to improve the quality of justice in the country, really.

Mr. FRANK. I am deeply respectful of that, sir.

Mr. MOORHEAD. It won't be the cap stone on Mr. Hughes's tombstone that he did away with diversity or raised it. I don't think it would be anybody's demise if we voted for it.

We have got to find the right answers here to improve the quality of justice. And I am very, very concerned about what is happening in the Federal courts these days and the increased number of criminal penalty cases that they are getting ready to send to them.

I know every case is important, but the Federal courts were never established to handle minor cases or—it was the major cases that affected the American people is what they were designed for.

I have a feeling that we are taking away that portion of it. And I have talked to the Justices of the Supreme Court about this very issue and many of the circuit court judges. And they are just as concerned about it as we are.

And I know you said, why pick on these 50,000 cases. I'd just as soon pick on the others too. I think we are trivializing the Federal courts when we put a lot of this stuff into it that is being put into it. But I don't have the votes to stop it. I try.

Now, we might—something like this, we might have the votes to get it through, but anything that helps will be a benefit. And I appreciate your position. And I know a lot of the major law firms use diversity. Not many of the others, but a lot of the major firms do.

Mr. FRANK. May I comment on that, sir?

You will notice that the ABA is in opposition here. So is ATLA, which involves much smaller law firms, generally speaking. This is one of the rare instances in which those competing bodies are united. You mention that some judges oppose, and that you know lawyers who don't care.

All I am able to say is that the thousands of lawyers who do use diversity, like it and would like to keep it, and would appreciate it please if you would not tinker it up. That is about where we are.

Mr. MOORHEAD. Mr. Dolin, do you have any comments?

Mr. DOLIN. To return to your earlier remarks about the amount in controversy, to the extent that there were pending cases in the Federal courts by virtue of diversity jurisdiction, the increase in amount from controversy from $10,000 to $50,000 has had an extraordinary effect and we are down, as I mentioned, from 70,000 annually to roughly 50,000 annually. A huge decrease.

At the same time, we have been seeing the Federal criminal caseload fill that gap, which is, from my point of view, one of the problems. I think it is appropriate periodically—I think it is too early, but it is not inappropriate periodically to revisit the amount in controversy. It has been revisited before. I think it is too early.

I think we have put a big dent in the diversity cases. And in some jurisdictions there was just a huge decrease in the number of diversity jurisdiction cases, much more than was expected.

And I think we have got a system today that works on a number of levels. We have heard the argument in favor of diversity, that it is a quicker way to get into the courthouse. I think that is very important in a lot of areas, but we are also talking about a form

of jurisdiction that has been a part of our federalism for years. It works.

The dialog that it generates between the State and Federal system is something that in my own area of practice, I see the payoff every day. You have got the Federal courts, which have greater resources, law clerks, they help get the lawmaking expedited.

I am in the chairman's home State in Federal court frequently on State law matters. And by virtue of the resources, the Federal courts, because they can write published opinions and whatnot, judges like Judge Brotman and Judge Fisher have helped develop areas of State law, and from all indications I have, the State courts don't resent that function. It is helpful to them, and it is helpful to litigants.

Mr. MOORHEAD. The $50,000 doesn't represent very much money today in many of the big cities, and it can deny being shoved into the Federal courts. The costs sometimes are so frightening to people that have lesser means, that major, major corporations and people who do have lots of funds can really scare the little guy out before he gets to court.

Many people just don't have that ability. They can go to the superior court or the municipal court in the communities and those levels have been raised dramatically, as you know.

They can do it for a lot less money, primarily because you cannot get a lot of lawyers—you can't get half of them that really want to go to Federal court very often. And their prices are pretty high, if they do.

Mr. DOLIN. If I make speak to that briefly, the timing of this proposed legislation is interesting. We are at a point where Congress in 1990 passed the Civil Justice Reform Act, and more recently the Judicial Conference approved changes in the Federal Rules of Civil Procedure.

We are in a new terrain now in the Federal courts and at least the aspiration of these legislative and rule changes is to make Federal practice more expedited, more efficient, less burdensome. We have got this great experiment that has just been launched, and my view is that those innovations are likely to reduce the burdens, particularly in diversity cases, which these innovations are going to have the most effect on, certainly the rule changes.

Mr. MOORHEAD. Well, I know that if you both could encourage Congress to cut back on all these other areas that they are shoving into the Federal courts, I know I would be glad to join you on this diversity question, because I don't think it is as important as the others in the long run.

But I do think that it is important that we uphold the Federal courts on the same level that we've always held them on when they are handling cases that are important to the Nation. And our appellate courts need to have the time that it takes to really consider the issues that come before them, especially the Supreme Court.

And they are all getting so busy and so crowded—so tied up with volume that they are having difficulty getting the time that they need to spend in determining what the law should be. I know that because I have talked to many of the judges.

And I guess that is why we are concerned about any issue that can somewhat reduce the overall volume. It is hard for me to see

how the diversity question today could be the basis for putting a case on more of a fast track than it was on before.

And I know that we are in times now when a Los Angeles jury gave someone out of tax money several millions of dollars who may have been very seriously at fault himself in the whole thing. I don't think—in other words, I don't think we are playing hometown justice or personal interest justice to any great extent in the courts, at least in the major cities in California.

Mr. HUGHES. Thank you. Mr. Dolin, I agree that we are doing a lot of things to attempt to expedite justice. New changes, recommendations in the civil rules of procedure and many other things. We need to look at every aspect of our operations to ensure that we are effecting good policy, and I think you would agree with that.

Diversity is just one of those areas where, again, I think we need to not just look at whether or not we can reduce the caseloads, but whether or not it is good policy today. I mean, that is the bottom line.

Well, thank you. You have been very helpful. I do have some other questions, which I am going to submit to you. I would appreciate it if you would respond to us in 10 days for the record. We thank you for your contributions.

As always, you have been very, very helpful. Thank you very much. The subcommittee stands adjourned.

[Whereupon, at 11:52 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—ANSWERS OF MITCHELL F. DOLIN TO WRITTEN QUESTIONS POSED BY CHAIRMAN WILLIAM J. HUGHES, JUNE 6, 1994

1. The Federal-State Jurisdiction Committee in its report to the Judicial Conference states that the original justification for in-state [plaintiffs'] diversity jurisdiction was to act as a ". . . prophylactic against state court bias in the enforcement of debts."

Do you dispute this?

ANSWER: Yes. There is nothing in the primary or secondary literature of which I am aware suggesting that the Framers actually articulated separate and specific justifications for in-state plaintiffs' diversity jurisdiction, on the one hand, and other permutations of diversity jurisdiction, on the other hand. Indeed, if the dominant purpose of diversity jurisdiction was to protect plaintiff/creditors from state-court bias, it would be difficult to explain why the Judiciary Act of 1789 did not extend diversity jurisdiction to cases in which none of the parties resided in the forum state. See Judiciary Act of 1789, § 11, 1 Stat. 73, 78 (limiting diversity jurisdiction to suits "between a citizen of the State where the suit is brought, and a citizen of another State").[1/] Similarly, if state-court bias in the enforcement

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[1/] In fact, an early draft of Section 11 of the Judiciary Act would have authorized jurisdiction over cases in which none of the parties resided in the forum state. See Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 79 (1924).

of debts was the major concern, the $500 minimum amount in controversy set by the 1789 Act would make little sense.

As a general matter, it should be emphasized that both champions and critics of diversity jurisdiction agree that there is little, if any, evidence as to why diversity jurisdiction was provided for in Article III, section 2, of the Constitution or in the Judiciary Act of 1789. As Professor Moore's authoritative treatise states, "while it is difficult to say why the Framers included and Congress enacted a grant of diversity jurisdiction, it has been a staple for two centuries, during which it has had some salutary effects on the nation." 1 James W. Moore, et al., Moore's Federal Practice ¶ 0.71 [3.-1], at 713 (2d ed. 1993). Similarly, the leading treatise co-authored by Professor Wright, who has in the past been cited as a critic of diversity jurisdiction, concedes that "[n]either the debates of the Constitutional Convention nor the records of the First Congress shed any substantial light on why diversity jurisdiction was granted to the federal courts by the Constitution or why the First Congress exercised its option to vest that jurisdiction in the federal courts." 13B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3601, at 337 (1984).

To be sure, some historians and commentators have traced the origins of diversity jurisdiction to a desire to protect litigants from geographical and anti-creditor

prejudices in the State courts. The fact remains, however, that the original justifications for diversity jurisdiction are murky, and there is no evidence that the Framers ever developed or articulated a special rationale applicable only to in-state plaintiffs' diversity jurisdiction. Moreover, and of critical importance to the debate over the pending bills, there is nothing in the text of either the Constitution or the Judiciary Act of 1789 to suggest that the benefits of diversity jurisdiction should be affected by whether or not the plaintiff is a resident of the forum state.

2. The Federal-State Jurisdiction Committee also states that the use of the in-state plaintiff diversity jurisdiction allows a plaintiff to file a claim in federal court based on state law, but then bypasses the state court system. They believe this process is bad judicial administration.

Would you care to comment?

ANSWER: The system of coordinate jurisdiction, under which the federal and state courts are both empowered to resolve questions of state and federal law, has been a vital part of Our Federalism since 1789. While some may think it anomalous, it has well served our Nation and is not inconsistent with notions of sound judicial administration.

The federal courts have been resolving state-law claims raised in diversity cases for more than 200 years. Indeed, the federal courts also address state-law issues in many types of cases besides diversity actions. For instance,

state-law issues are routine fare in litigation involving the federal government and in bankruptcy proceedings; state-law issues also frequently arise in federal-question cases, either by virtue of supplemental (e.g., pendent and ancillary) state-law claims, because many federal statutes expressly incorporate state law by reference, or because state law is "borrowed" to resolve procedural and other issues. Thus, even if diversity jurisdiction were to be abolished, the federal courts would very much remain in the business of deciding state-law questions.

The federal courts are well equipped to handle diversity and other cases posing state-law issues. The judges who comprise the federal bench, like the lawyers who practice before them, are typically trained and experienced in matters of state law, and many are recruited from state judicial posts. To the extent that new federal judges face a learning curve, that learning curve is more likely to implicate the federal criminal and arcane federal statutory dockets than the diversity docket. If one measures judicial administration by judicial competence, it cannot be said that placing diversity cases before federal judges is unsound judicial administration.

Moreover, the presence of coordinate jurisdiction over cases arising under state law fosters an important dialogue between the state and federal systems on matters of substantive and procedural law. Although state high courts

are the final arbiters of questions of state law, the federal courts have traditionally made enormous contributions to the development of state law. By virtue of the resources of the federal courts, including the publication of trial-level opinions in official reporters and more generous funding for law clerks, the federal courts are frequently on the front lines of state-law developments and provide important guidance to litigants and the state courts. To the extent that diversity jurisdiction promotes a friendly competition that permits both systems to refine and improve their separate procedural mechanisms, notions of effective judicial administration are enhanced as well.

Finally, diversity jurisdiction today permits a plaintiff to opt for the state or federal court with the least crowded docket. The presence of this safety valve, which facilitates an efficient caseload allocation, also advances notions of sound judicial administration.

3. The Conference of Chief Justices of the state courts has submitted a written statement for the record in which it affirms ". . . the willingness of the state court systems to assume any additional caseload resulting from adoption of H.R. 4446 and supports the idea of establishing equity between in-state plaintiff[s] and in-state defendants with respect to diversity jurisdiction."

Would you care to comment on this?

ANSWER: My understanding is that the Conference of Chief Justices, in a resolution adopted more than fifteen

years ago, expressed a willingness to assume "all or part of the diversity jurisdiction presently exercised by the federal courts." In August 1987, without modifying its existing position, the Conference adopted a resolution endorsing an increase in the minimum amount-in-controversy requirement for federal diversity cases. It is my understanding that there has been no other formal action by the Conference as a whole.

While it is not inappropriate for the Subcommittee to take into account the Conference's position, I do not believe it to be of dispositive importance for several reasons. First, the ABA's position against the pending bills, like that of ATLA and other bar organizations, is largely based on the benefits diversity jurisdiction affords to litigants; for this reason, we believe that the perceptions of the bar -- which stands closest to the actual consumers of the court systems -- should be entitled to the greatest deference. Second, notwithstanding the stated willingness of the Conference of Chief Justices to absorb all or part of the federal diversity docket, the fact remains that in many jurisdictions litigants face lengthier delays in state courts than they do in federal courts. Third, in many jurisdictions, state judicial systems are seriously underfunded, and the ABA is not persuaded that the state legislatures would provide the funding necessary to absorb the cases that the pending bills would shift to the state courts. Fourth, federal support for the state courts is now on the decline; for example, earlier

this year, the Administration announced a proposal to eliminate the State Justice Institute. Fifth, while the Conference of Chief Justices did express a willingness to absorb diversity cases in its 1977 resolution, it is unclear how solid support for that position is today; in their dissent to the diversity recommendations of the 1990 report of the Federal Courts Study Committee, Mr. Morris Harrell and Ms. (now Judge) Diana Gribbon Motz observed that "the majority of chief justices and other state court judges in the most populous states, . . . which would feel the additional burden most keenly, vigorously oppose the shift of diversity cases to them."

4. In Judge Marcus' statement, he estimates that only about 8,000 new cases per year would be eliminated if the in-state plaintiff (ISP) diversity jurisdiction was changed. Mr. Dolin's written statement indicates there were 20 million civil cases filed in state trial courts in 1992.

Wouldn't the elimination of ISP in the federal courts have a very limited effect on state courts?

ANSWER: No. While the elimination of ISP diversity jurisdiction may in the short term shift only 8,000 cases annually to the state courts, the number is likely to be much higher. Even assuming that 8,000 is an accurate estimate, however, it is not appropriate to look at the issue as one of merely adding another 8,000 cases to a state-court docket of 20 million. The issue must be dealt with in both qualitative and quantitative terms.

The 20 million civil cases filed in the state courts are simply not comparable to the diversity filings in the federal courts. Well over half of the 20 million state civil cases fall into specialized categories such as domestic relations, small claims, and probate. See State Justice Institute, State Court Caseload Statistics: Annual Report 1992 at xi-xii, 15 (Feb. 1994). The state tribunals and resources dedicated to handling those types of cases are not available to handle the types of cases that would be shifted to the state courts as a result of the pending bills. By contrast, the federal courts are by now accustomed to handling these cases and have adopted procedural devices to minimize the burden of these cases (e.g., multi-district litigation consolidation) that are unavailable to the state courts.

The estimated 8,000 diversity cases would be, on average, far more complex and burdensome than the routine cases that are handled by state courts of general jurisdiction. These 8,000 cases involve controversies with high dollar amounts at stake, complex business disputes, and mass-tort claims. On average, they would require a much heavier expenditure of state judicial resources and would be less amenable to early resolution than the routine state-court civil cases. For these reasons, Messrs. Victor Flango and Craig Boersema have concluded that "barring in-state plaintiffs from filing diversity cases in federal court would impose a disproportionate burden on state courts" and "might

be nearly as much of a burden on state courts as would be total abolition of diversity jurisdiction." Victor E. Flango & Craig Boersema, Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads, 15 Dayton L. Rev. 405, 455 (1990).

5. Mr. Dolin, in your written testimony you state: "The ABA submits, that while the pending bills appear to be less extreme than total elimination of diversity, they have the same basic defects and in some ways would have consequences even more untoward than total elimination."

Would you explain this?

ANSWER: The underlined portion of the passage from my statement refers to certain consequences unique to the elimination of in-state plaintiffs' diversity jurisdiction. For instance, if in-state plaintiffs' diversity jurisdiction were abolished, the option of securing a federal forum would be available to plaintiffs with the financial ability to litigate in another state, thus rendering the federal forum unattainable to poorer litigants. Those plaintiffs who leave their home states to secure a federal forum elsewhere will increase the cost of litigation and place controversies in venues less convenient to the parties and witnesses. Similarly, some plaintiffs will try to secure a federal forum by adding federal claims to their complaints, thus burdening the courts with peripheral issues.

Another untoward consequence unique to the elimination of in-state plaintiffs' diversity jurisdiction is that it would shift the forum-selection decision from the plaintiff to the defendant. Under the pending bills, the defendant sued by an in-state plaintiff would have the opportunity to choose between state and federal court, and it is possible that this option will be exercised by many defendants to place cases in the more heavily congested judicial system. Indeed, as the Federal-State Jurisdiction Committee itself observed at page 42 of its June 18, 1993, report to the Judicial Conference, "plaintiffs will seek the forum offering speedier trial, and (all else being equal) defendants will prefer the forum offering greater delay in getting to trial."

6. Mr. Frank, in your written testimony you note with approval the Erie Railroad Co. v. Tompkins case which switched, "unfair advantages to legitimate advantages." You then indicate that, ". . . the pace of the docket, the procedure applied, the quality of the available judges, and so on" would be legitimate advantages.

Do you believe these latter characteristics ought to determine jurisdictional lines between federal and state courts?

ANSWER: Not applicable.

7. Mr. Dolin, you state in your testimony that eliminating ISP diversity jurisdiction would deprive litigants of important federal innovations. You then mention a few such as the Federal Rules changes. I am very much interested in promoting innovative procedures in the federal system and many of the recent ideas came from the state systems. As I recall

the states were supposed to be the experimental laboratories for our democracy.

I still don't see how that is relevant to determining proper lines of jurisdiction between state and federal courts.

Would you care to comment?

ANSWER: The recent federal innovations to which I referred bear directly on the Judicial Conference's argument that elimination of ISP diversity jurisdiction is important because of the burden these cases currently place on the federal courts. My position is that these cases do not pose a significant burden on the federal courts; if Judge Marcus' estimate is correct, the ISP cases that would be shifted to the state courts account for less than four percent of the total civil cases filed each year in federal court. Moreover, recent federal innovations, including the Civil Justice Reform Act of 1990 and the amended Federal Rules of Civil Procedure, promise to ease any burdens that these cases now impose on the federal courts, particularly when coupled with prior federal innovations, such as the multi-district litigation procedures that are increasingly important in minimizing the burdens of mass-tort cases.

8. Mr. Frank, in your written testimony you quote some disturbing statistics about backlogs in a number of large metropolitan state court systems as compared with comparable federal courts.

Do you believe that is an acceptable basis upon which we should decide the lines between state and federal jurisdiction?

ANSWER: Not applicable.

APPENDIX 2.—LETTER FROM BARRY J. NACE, PRESIDENT, ASSOCIATION OF TRIAL LAWYERS OF AMERICA, TO HON. WILLIAM J. HUGHES, CHAIRMAN, SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION, MAY 26, 1994

ASSOCIATION OF
TRIAL LAWYERS OF AMERICA
1050 31ST STREET, N.W., WASHINGTON, DC 20007 202/965-3500

PRESIDENT
BARRY J. NACE
1814 N STREET, N.W.
WASHINGTON, DC 20036
(202) 463-1999

May 26, 1994

Representative William J. Hughes
Chairman
Subcommittee on Intellectual Property and
Judicial Administration
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Hughes:

Thank you for requesting the views of the Association of Trial Lawyers of America (ATLA) concerning H.R. 4446, a bill to require that plaintiffs in diversity of citizenship cases not be residents of the state where their suit is filed in Federal District Court.

ATLA is opposed to the bill.

As you know, we have been on record for many years in opposition to the abolition or modification of diversity of citizenship jurisdiction. We have never been persuaded, nor are we persuaded now, that sufficient reason exists to jeopardize citizens' rights that in many instances require the protection of our federal court system. These rights are as old as the republic. Diversity jurisdiction is rooted in the Constitution and has been part of our statutory law since Congress enacted the Judiciary Act of 1789.

Simply stated, then, barring the federal alternative to in-state plaintiffs is an unacceptable limitation on protected rights.

It is interesting that in transmitting this most recent recommendation to Congress, the Judicial Conference of the United States reiterated its support for the complete abolition of diversity jurisdiction. Noting the clear reluctance of Congress to agree to that, however, the Conference instead called for the elimination of in-state plaintiff jurisdiction as a "more limited proposal . . . to reduce federal civil caseloads." Such a recommendation is a dangerous proposition for several reasons. Restricting the rights of in-state plaintiffs, particularly proposing to do so by isolating them and removing the issue from its logical place within the larger debate on diversity jurisdiction generally, cannot be viewed fairly as a "limited" approach or as even-

handed. More disturbing still is any notion that the rights of our citizens can be sacrificed blindly to some bureaucratic goal of "judicial efficiency." The understandable desire to lighten caseloads and the worthy objective of lessening delay is no basis upon which to limit constitutionally rooted rights.

For the most part, ATLA's 60,000 attorneys are lawyers representing people. We are not corporate lawyers or the general counsel representing businesses. It is especially disturbing to us, therefore, that this proposed solution to the caseload problem often would result in limiting the rights of people. Why risk the rights of individuals, in the name of reducing federal caseloads, when individuals pursuing their rights simply are not responsible for the federal caseload problem in the first place? Businesses suing businesses in contract disputes comprised nearly half of all federal court cases filed between 1985 and 1991. While H.R. 4446 would affect business plaintiffs as well as individuals, it is often the individual plaintiff that most requires the protection afforded by the diversity option. To especially threaten the rights of certain plaintiffs in order to address a problem not of their making is patently unfair.

ATLA stands ready to work with the Congress, and with the Executive Branch, and with the courts to devise ways to improve the administration of justice in our federal system. Clearly, there are ways to improve judicial efficiency that are more consistent with the purposes of the nation and with the needs of our citizens. While they do not offer the 'one fell swoop' attraction that wiping out or limiting diversity jurisdiction does, they also do not endanger rights and are not at odds with the system of justice that has served us since 1789.

Again, thank you for the opportunity to share our views.

Sincerely yours,

Barry J. Nace

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APPENDIX 3.—"A FRESH LOOK AT IN-STATE PLAINTIFF DIVERSITY JURISDICTION: WHY IT WAS ENACTED AND WHY IT SHOULD BE REPEALED," A REPORT TO THE U.S. JUDICIAL CONFERENCE FROM THE COMMITTEE ON FEDERAL-STATE JURISDICTION, JUNE 18, 1993

INTRODUCTION

In this Report the Federal-State Jurisdiction Committee revisits the issue of in-state plaintiff (ISP) diversity jurisdiction. The Committee proposes that the Conference reaffirm its long-standing position that ISP diversity jurisdiction should be repealed, but offers new supporting reasons. The Committee believes that ISP repeal is most likely to be accomplished by "unbundling" the justification for ISP repeal from the larger and more controversial issue of repeal of diversity jurisdiction in general.

In Part I we review the history of ISP diversity jurisdiction to explain an apparent paradox. When the First Congress provided for general diversity jurisdiction as a protection for out-of-state litigants from the local bias of state courts, it denied access to diversity jurisdiction to in-state defendants but permitted such access to in-state plaintiffs. We show that the First Congress had good reason in the contemporary circumstances of the Judiciary Act of 1789 to permit a plaintiff to sue an out-

of-state defendant in federal court even when suit was brought in the plaintiff's home state.

In Part II we demonstrate that the historic justification for ISP diversity jurisdiction has become anachronistic. Two centuries of social and legal change have produced a profoundly different environment for civil litigation in modern state and federal courts than existed in 1789. No present justification exists for retaining ISP diversity jurisdiction.

In Part III we discuss the dominant challenge facing federal courts in the adjudication of civil cases: the caseload pressure that has resulted from decades of sustained growth in the number of new cases filed annually in federal courts. This pressure has been most intense at the trial court level with respect to private civil cases, particularly those brought to enforce federal statutory rights. It has been compounded by a criminal docket that has grown ever more demanding of judicial time even though the growth in the size of the criminal docket has been far more modest than the growth of the civil docket. These trial court dockets, in combination with an increased willingness of litigants to seek review of trial court action, have produced a volume of appeals that threatens soon to overwhelm the existing structure of the courts of appeals. Moreover, caseload forecasts for the year 2020 suggest that these trends, if they continue, based on a set of common assumptions, may produce either judicial gridlock or a federal judiciary of such unwieldy size as to undermine the ability of the federal judiciary to perform its core functions.

In Part IV we discuss the core functions of federal courts that are threatened by the challenges and trends identified in Part III. If the ability to perform these core functions is to be preserved, Congress cannot long ignore the imperative need for jurisdictional reforms that leave to state courts the adjudication of cases in which federal interests are marginal or non-existent.

Having determined in Parts I and II that the passage of time has dissolved any conceivable federal interest in the adjudication of ISP diversity cases, and in Parts III and IV that the federal courts are in need of caseload relief, in Part V we estimate the contribution that repeal of ISP diversity jurisdiction would make to preserving the ability of the federal courts to perform their core functions. While the degree of relief from caseload pressure that would be produced by repeal of ISP diversity jurisdiction cannot be quantified with certainty, it would undoubtedly be significant.

In Part VI we conclude our report by proposing statutory language that would repeal ISP diversity jurisdiction without otherwise affecting the scope of general diversity jurisdiction.

I. THE HISTORICAL BASIS FOR IN-STATE PLAINTIFF DIVERSITY JURISDICTION

Since their creation by the Judiciary Act of 1789, the lower federal courts have been vested with both original and removal jurisdiction over controversies between parties who are citizens of different States. This is the purest form of "diversity" jurisdiction: in such suits federal judicial power is based

exclusively on the political characteristics of the parties without any overlapping basis for federal jurisdiction because of the potential applicability of federal substantive law.[1]

Congress has never exercised the full scope of its power to grant federal jurisdiction in pure diversity cases. The "general" diversity statute, currently codified as 28 U.S.C. § 1332(a), has always required a minimum amount in controversy and complete diversity of citizenship of all parties with opposing interests.[2] But despite this measured approach to implementation of congressional power to confer pure diversity jurisdiction, one

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[1]Article III also grants federal judicial power over cases and controversies involving issues of law implicating the powers of the national government. It has long been recognized that these "two classes of cases," conferring jurisdiction based on either the "character of the cause" or the "character of the parties," are not mutually exclusive. Cohens v. Virginia, 19 U.S. 264, 378, 392 (1821). From a modern perspective it appears that many of the Article III categories of permissible party-based federal jurisdiction may be subsumed within the more general and fundamental category of cases governed by federal substantive law, such as suits "to which the United States shall be a party," suits "affecting Ambassadors and other public Ministers and Consuls," suits "between two or more States," and some if not all suits involving "foreign States, citizens, or subjects." In light of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), however, the reach of federal substantive law is not boundless. There remain some suits between private parties whose legal relations are not governed by federal substantive law. These suits, although governed only by state law, may nonetheless be brought before federal courts based solely on the diverse citizenship of the parties. Thus the grant of federal jurisdiction in such cases is "diversity" jurisdiction in its purest sense.

[2]In addition to the "general" diversity statute, 28 U.S.C. 1332(a), Congress has enacted a "special" diversity statute, 28 U.S.C. § 1335, applicable to interstate interpleader cases. This specialized grant of diversity jurisdiction requires that only $500 be in controversy (rather than § 1332(a)'s requirement of an amount in excess of $50,000), and demands only "minimal" diversity between at least two, but not all, parties with opposing interests. See State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967).

feature of the jurisdiction has remained constant from 1789 to the present day. While forbidding removal to federal court by a defendant whom an out-of-state plaintiff has chosen to sue in the courts of the defendant's own State, Congress has authorized an in-state plaintiff to invoke federal diversity jurisdiction to sue an out-of-state defendant in the federal courts of the plaintiff's own State.

This favored treatment of in-state plaintiffs vis-à-vis in-state defendants has drawn a great deal of critical commentary,[3] but in recent years calls for its repeal have almost always been commingled with and subordinated to a broader attack on the wisdom of general diversity jurisdiction.[4] We wish to take a different

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[3]The modern era of such commentary began with American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 99-132 (1969) (hereinafter "ALI Study"). Although it endorsed continuation of general diversity jurisdiction in cases involving genuine "outsiders" who might feel exposed to local prejudice if forced to litigate in state courts, the ALI called for repeal of ISP diversity jurisdiction and sought to expand the scope of that repeal by, in effect, deeming business entities to be citizens of any state in which they had maintained a "local business establishment" for two or more years immediately preceding their invocation of federal jurisdiction by suit or removal of suit, and by deeming an individual to be a citizen of a state which had been the individual's principal place of business or employment for two or more years immediately prior to invoking federal jurisdiction by suit or removal of suit. See ALI Study at 123-132. Citations to the precursors to the ALI Study and the reactive literature are collected in Charles Alan Wright, The Law of Federal Courts, § 23, at 130-132 & nn.16-23 (4th ed. 1983) (hereinafter cited as "Wright on Federal Courts").

[4]The ALI Study drew extensive criticism for endorsing the principle of general diversity jurisdiction, and even Professor Wright, the associate reporter for other portions of the ALI Study, was moved eventually to withdraw his support for the limited reforms proposed by the ALI and to call instead for complete abolition of general diversity jurisdiction. See Wright on Federal Courts, supra note 3, § 23, at 131-132 & n.23. In March of 1977

tack by "unbundling" the narrow issue of repeal of in-state plaintiff diversity jurisdiction from the broader issue of the merits of general diversity jurisdiction.[3]

In our view history provides a sound justification for the decision by the framers of the Judiciary Act of 1789 to provide asymmetrically for access to general diversity jurisdiction by in-state plaintiffs but not by in-state defendants. The fundamental purpose of general diversity jurisdiction in 1789 was to provide a neutral federal forum for resolution of interstate commercial controversies,[4] the lack of which was sapping the economic strength

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the Judicial Conference endorsed complete abolition of general diversity jurisdiction, as well as the "lesser-included" alternative of repeal of in-state plaintiff diversity jurisdiction. Report of the Proceedings of the Judicial Conference, March 1977, at 8-9. Since that time the Judicial Conference has frequently reaffirmed its endorsement of repeal of in-state plaintiff diversity jurisdiction, but in endorsing this and other "half-a-loaf" restrictions of diversity jurisdiction the Judicial Conference has always been at pains to declare that it was not "departing from recommendations to adopt more extensive restrictions on diversity jurisdiction or to abolish it altogether." (See, e.g., Report of the Proceedings of the Judicial Conference, Sept. 1987, at 72.) The Federal Courts Study Committee took a similar approach. Report of the Federal Courts Study Committee 38-42 (1990) (advocating "broad elimination of diversity jurisdiction" with repeal of in-state plaintiff diversity jurisdiction included as a "back-up proposal").

[3]In this respect we follow the lead of the Chief Justice. See William J. Rehnquist, Remarks of the Chief Justice: Diversity Jurisdiction and Civil RICO, 21 St. Mary's L.J. 5, 7-9 (1989) (address to the Brookings Institution's Eleventh Seminar on the Administration of Justice).

[4]Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 82-83 (1923).

of a young nation.[7] Of special concern was the impairment of credit markets by parochial state courts reluctant to enforce instruments of debt.[8]

The congressional judgment that in-state plaintiffs merited the alternative forum of a federal court, but in-state defendants

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[7]ALI Study, supra note 3, at 101.

[8]"[I]t is clear that the framers of the Constitution attached the utmost importance to the fidelity of financial obligations, both public and private. This consideration pervaded their deliberations, and it is unquestionably manifested in the finished product." Clyde Jacobs, The Eleventh Amendment and Sovereign Immunity 22 (1972). See generally id. at 8-24. See also id. at 41:

> Legislative provision for the federal courts was made in the Judiciary Act of 1789, which Congress adopted after some months of deliberation. The act was, in large measure, the handiwork of Oliver Ellsworth, who, as a member of the Committee on Detail of the Philadelphia Convention, had helped shape Article III. The First Congress, which deliberated upon and passed the act, was composed of many who had participated in framing and ratifying the Constitution. For these reasons, the Judiciary Act may be read as an important contemporaneous exposition of the original meaning attributed to Article III.

The so-called "Madisonian compromise" by which Article III granted broad jurisdictional power to the Congress subject to its discretionary control over the structure and jurisdiction of the lower federal courts was actually coauthored by James Madison of Virginia and James Wilson of Pennsylvania. Wright on Federal Courts, supra note 3, § 1, at 2. Special significance therefore attaches to Wilson's remarks to the Pennsylvania convention that ratified the Constitution.

> In defense of the provision conferring diversity jurisdiction in controversies between citizens of different states and between a state or its citizens and foreign states or their subjects, Wilson adverted to the need to restore public and private credit. Foreigners, like American citizens, should have access to a just and impartial tribunal and not have their rights as creditors placed at the mercy of state laws and state tribunals.

Jacobs, supra, at 29.

did not, makes eminent sense if the underlying problem was not only state court prejudice against outsiders, but also state court prejudice against creditors.' The national problem of impairment of credit -- already given constitutional stature by Article I, section 10's interlocking prohibitions against state legislative

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'As Professor Jacobs has written:

> Regardless whether the financial policies of the states were actually as chaotic as critics of the Confederation claimed, the important fact is that Madison and other nationalists were convinced that these policies would create serious discord at home and abroad. . . . Madison penned a short note expressing some of his concerns and suggesting additional safeguards. "Paper money, installments of debts, occlusion of courts, making property a legal tender" are aggressions upon the rights of other states and upon foreign nations, for the citizens of every state, in the aggregate, stand in the relation of creditor and debtors to the citizens of every other state. When a debtor state acts in favor of debtors, such acts "affect the creditor state in the same manner as they do its own citizens." Madison feared the frauds upon the citizens of other states and upon foreign subjects because legislation in favor of debtors might disturb the domestic tranquility and involve the Union in foreign contests. Madison's note no doubt relates primarily to the policies of some states regarding the settlement of private debts, and the Philadelphia Convention, in drafting the Constitution, was soon to erect important safeguards against state interference in behalf of private debtors. But the principal purpose of such safeguards, as understood by Madison and other nationalists -- to prevent frauds by the states upon non-citizens and foreigners in order to alleviate interstate and foreign friction -- also supports a grant of power to the federal government with respect to the settlement of the states' public obligations toward foreigners and citizens of other states. The Judiciary Article of the Constitution, with reference to certain assignments of judicial power to the United States, may be construed in light of this seemingly transcendent objective.
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> . . . The resolution on the judiciary . . . indicates that the nationalists desired a federal judicial power that could reach those matters transcending, in any manner, the interests of individual states vis-à-vis their own citizens.

Id. at 15-16.

action to alter the value of currency or otherwise to impair the obligation of contracts -- provided ample justification for giving creditors access to federal court (on claims in excess of the jurisdictional amount) whenever the requisite diversity of citizenship gave Congress the Article III power to do so.[10] But no similar concern for state-court underenforcement of legal defenses existed, and so the rationale for permitting removal was appropriately limited to the danger that defendants would be discriminated against based on their out-of-state citizenship rather than their in-court litigating position. This rationale was exhausted by allowing out-of-state defendants to remove claims against them to federal court, without allowing a similar option to in-state defendants to whom out-of-state plaintiffs were willing to cede a "home court" advantage.

II. IN-STATE PLAINTIFF DIVERSITY HAS BECOME AN ANACHRONISM WITHOUT ANY MODERN JUSTIFICATION

We have identified two distinct and only partially overlapping congressional goals that were effectuated by the diversity provisions of the first Judiciary Act. On the one hand, the First Congress provided for general diversity jurisdiction as a prophylactic against the corrosion of national unity by state court bias against out-of-state litigants. On the other hand, the First Congress provided for ISP diversity jurisdiction as a prophylactic

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[10] See Wright on Federal Courts, supra note 3, § 24, at 136-137 (noting the force of the "free flow of capital" justification for diversity jurisdiction, but doubting its continued vitality in modern circumstances).

against state court bias in the enforcement of debts. Whatever the arguments that may justify retaining general diversity jurisdiction in light of modern conditions in state and federal courts, the historical reasons for supplementing general diversity jurisdiction with ISP diversity jurisdiction have completely disappeared. In the litigating environment of modern state and federal courts, ISP diversity jurisdiction is profoundly anachronistic, an orphan of history that has long outlived the circumstances of its creation.

We are aware of no modern arguments that in-state plaintiffs require access to federal diversity jurisdiction because state courts are systematically biased in favor of defendants in the adjudication of state-law claims. There is contemporary debate about the possible underenforcement by state courts of claims for enforcement of federal rights. Such concerns are frequently invoked to justify the extensive scope of the federal courts' original and removal jurisdiction over private federal civil causes of action, and to justify federal collateral review of state court criminal judgments. But nowhere in contemporary debate can one find an expression of continuing concern that state courts are systematically underenforcing state-created rights -- at least where the putative rights in issue were created by the law of the State providing the forum.[11] In fact, the dominant contention in

[11]We thus leave to one side the prickly issues of choice of law in interstate products liability, pollution, and mass tort cases that for lack of complete diversity must be litigated in state courts. The American Law Institute has recently adopted a recommendation that Congress exercise its jurisdictional power over litigation involving "minimal" diversity of citizenship to enact a complex litigation statute that would permit complex cases to be

modern debate over state-court adjudication of civil claims is that lawsuits have become too easy to bring and too expensive to defend, resulting in the over-enforcement of state-created rights, particularly those sounding in tort and thus subject to arguably arbitrary awards of punitive damages.[12]

While some have argued that modern conditions continue to provide a sound justification for retaining general diversity jurisdiction, no independent practical or theoretical justification can be found for retaining ISP diversity jurisdiction. Given the anachronism of the concerns of the First Congress for protecting creditor plaintiffs in state courts, repeal of ISP diversity jurisdiction is entirely compatible with preservation of the balance of general diversity jurisdiction, including the retention of the privilege of removal by out-of-state defendants as a protection against whatever localized bias they may encounter when sued in state court by in-state plaintiffs.

The lack of any present justification for ISP diversity jurisdiction is itself a powerful argument for its repeal. Moreover, the federal courts are challenged by caseload pressure that impairs their abilities to perform their core functions, and

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consolidated and transferred to a single state or federal "magnet" court for disposition under a national choice of law rule. See American Law Institute, Complex Litigation Project (Proposed Final Draft of April 5, 1993, adopted by the Institute on May 12, 1993).

[12]See Pacific Mutual Life Insurance Co. v. Haslip, ___ U.S. ___, 111 S. Ct. 1032 (1991); TXO Production Corp. v. Alliance Resources Corp., 187 W. Va. 457, 419 S.E. 2d 870, cert. granted ___ U.S. ___, 113 S. Ct. 594 (1992) (argued Mar. 31, 1993, 61 U.S.L.W. 3705).

in this context retention of ISP diversity jurisdiction would seem to be particularly unjustified. Repeal of ISP diversity jurisdiction would assist the federal courts in meeting the needs of the only class of contemporary plaintiffs who perceive themselves disadvantaged when forced by congested federal dockets to present their claims to state courts -- plaintiffs who seek to vindicate rights created by federal rather than state law. We thus turn from examining the outmoded historical circumstances that originally justified ISP diversity jurisdiction to the contemporary circumstances that make continued retention of ISP diversity jurisdiction an unwarranted burden to inflict on the federal courts.

III. PAST AND FUTURE PERSPECTIVES ON THE NATURE AND PACE OF FEDERAL CASELOAD GROWTH

There is a growing recognition that federal caseloads have increased markedly in size and changed in their complexity. Many commentators have addressed the cumulative effect of caseload growth, particularly over the past three decades.[11] While preferred

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[11]See, e.g., Report of the Federal Courts Study Committee (1990); Terence Dungworth & Nicholas M. Pace, Statistical Overview of Civil Litigation in the Federal Courts (1990); Richard A. Posner, The Federal Courts: Crisis and Reform (1985); Frank M. Coffin, Judicial Gridlock: The Case for Abolishing Diversity Jurisdiction, Brookings Review 34 (Winter 1992); Thomas J. Meskill, Caseload Growth: Struggling to Keep Pace, 57 Brooklyn L. Rev. 299 (1991); Roger J. Miner, Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee, 65 St. John's L. Rev. 673 (1991); J. Clifford Wallace, The Future of the Judiciary: A Proposal, 27 Cal. W. L. Rev. 361 (1991); Lauren K. Robel, Caseload and Judging: Judicial Adaptations to Caseload, 1990 B.Y.U. L. Rev. 3; Jon O. Newman, Restructuring Federal Jurisdiction: Proposals to Preserve the

stategies for dealing with current federal caseloads are hotly debated, the sheer numbers cannot be denied. In the thirty years from 1961 to 1991, filings in the district courts nearly tripled.[14] During the same period filings in the courts of appeals increased ten-fold.[15] While the numbers of district and circuit judges have also increased, the numbers of new judges have not been sufficient to prevent substantial increases in caseload per judge.[16] Over the

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Federal Judicial System, 56 U. Chi. L. Rev. 761 (1989); Irving R. Kaufman, New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator, 57 Fordham L. Rev. 253 (1988); Roger J. Miner, Federal Courts, Federal Crimes, and Federalism, 10 Harv. J. L. & Pub. Pol'y 117 (1987).

[14]In the 1961 statistical year (the twelve month period ending June 30, 1961), 86,753 cases (58,293 civil; 28,460 criminal) were filed in the federal district courts. 1961 Annual Report of the Director of the Administrative Office of the United States Courts 234 (table C-1), 267 (table D-1) [hereafter cited as "1961 Annual Report"]. In the 1991 statistical year, 253,477 cases (207,742 civil; 45,735 criminal) were filed. 1991 Annual Report of the Director of the Administrative Office of the United States Courts, at 2 [hereafter cited as "1991 Annual Report"]. The increase in the annual number of cases filed over the thirty-year period was 292 percent.

[15]4,204 appeals were filed in the courts of appeals in statistical year 1961. 1961 Annual Report, supra note 14, at 222 (Table B-1). For statistical year 1991, the number of appeals increased to 42,033. 1991 Annual Report, supra note 14, at 162 (Table B). The increase in the annual number of appeals filed over the thirty year period was 1000 percent.

[16]As of May 19, 1961, Congress increased the number of authorized district judges by 63, from 245 to 308, and increased the number of authorized circuit judges by 10, from 68 to 78. (1961 Annual Report, supra note 14, at 12, 116.) As of June 1, 1992, there were 649 authorized district judgeships, of which 563 were filled and 86 were vacant, and 179 authorized circuit judgeships, of which 158 were filled and 21 were vacant.

For purposes of our individual judicial caseload calculations, we assume that all 245 authorized district judgeships and 68

three decades just referenced, from 1961 to 1991, the per-judge caseload rose by 27 percent for district judges and 329 percent for circuit judges.[17]

Our review of these statistics prompted us to join with the Long Range Planning Committee in requesting that the Statistics Division and the Long Range Planning Office of the Administrative Office of the United States Courts prepare a detailed analysis of federal court caseloads for as long a retrospective period as possible, with particular attention to the period since 1950. We also asked for the development of forecasts that would, to the extent practicable, project federal court caseloads from the present through the year 2020.[18]

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circuit judgeships were filled throughout statistical year 1961, and that none of the newly authorized judgeships of May 19, 1961, were filled by judges who took office prior to the end of statistical year 1961 on June 30, 1961. We similarly assume that there were 563 active district judges and 158 active circuit judges in office throughout statistical year 1991.

These data indicate that there were 354 cases filed in statistical year 1961 for each district court judge in regular active service, and that 62 appeals were filed per sitting circuit judge in regular active service in 1961. (If the newly created judgeships of May 19, 1961 are added in, the case-per-judge figures drop to 282 for district judges and 54 for circuit judges in 1961.) By comparison, thirty years later there were 450 cases per sitting district judge in regular active service in 1991, and 266 cases per sitting circuit judge. (If the authorized-but-vacant judgeships are added in, the 1991 figures become 391 cases-per-district-judgeship and 235 cases-per-circuit-judgship.)

[17]These percentages are derived from the figures for sitting judges, supra note 16: 354 cases filed per sitting district judge in 1961 versus 450 cases filed per sitting district judge in 1991, and 62 appeals filed per sitting circuit judge in 1961 versus 266 appeals filed per sitting circuit judge in 1991.

[18]Our request resulted in a study entitled "Federal Court Caseloads Since 1950," by William T. Rule, Chief of the Analytical Studies Group of the Long Range Planning Office. Unless otherwise

The projections are startling. They indicate that, if current trends continue, by 2020 there will be over 830,000 civil cases filed each year in federal court, in addition to nearly 130,000 criminal cases and 430,000 appeals. Under current workload standards this would require a complement of nearly 2,800 district judges and nearly 2,300 circuit judges.[19]

A. Growth of the Civil Docket

The population of the United States has increased by slightly more than 200 percent in the years since 1904. During that same period annual civil case filings increased by 1,424 percent, with most of the growth occurring since 1960.

Decade-by-decade figures beginning with 1950 show that as of 1950 nearly 55,000 civil cases were being filed each year in the federal courts. The next decade saw only an 8.5 percent growth in

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indicated, this study is the source of the data referred to in the balance of Part III.

[19]These projections should be viewed with the caution appropriate to any use of regression analysis to predict future events.

> The forecasts presented in this paper are trend forecasts. As such they reflect the cumulative impact of all of the various phenomena which combine to determine the number and types of case filings in the federal judicial system. Some of these phenomena are under the control of one or more branches of the federal government; others are independent of any effective control. Trend forecasts do not and cannot incorporate reactions to developments in the judicial arena beyond those already reflected in the data. Moreover, conditions in the future will almost certainly differ from those which prevailed in the past. As a consequence, these forecasts should be understood as representing one of many possible future scenarios. No claim of superiority over any other projection is made for these forecasts.

"Federal Court Caseloads Since 1950," supra note 18.

the civil docket, but from 1960 to 1970 civil cases increased by 47.3 percent, from 1970 to 1980 they increased by a further 93.3 percent, and from 1980 to 1990 they increased by another 29.1 percent. In 1992 the annual number of civil filings in the federal courts was 226,459.

This quadrupling of the federal civil docket was not distributed evenly across that docket. The proportion of federal government cases (the United States as plaintiff or defendant) among annual civil filings fell from 41.1 percent of new civil filings in 1950 to only 25.8 percent in 1990. In other words, nearly three-quarters of the federal civil docket now consists of private civil cases. The proportion of diversity cases remained fairly constant: 24 percent in 1950, and 26.2 percent in 1990. The ratio of federal question cases to all civil cases mushroomed, however, from 12.4 percent in 1950 to 47.7 percent in 1990.[20]

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[20]Congress has fueled this growth by creating in recent years many new statutory rights enforceable by private causes of action in federal court. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e1 to 2000e17; the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634; the Privacy Act of 1974, 5 U.S.C. § 552a; the Freedom of Information Act, 5 U.S.C. § 552; ERISA, 29 U.S.C. §§ 1001 et seq.; and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. A relatively small proportion of such statutes appear to be responsible for a large portion of the federal judicial workload. A preliminary study suggests that, to the extent existing "statutory cause of action" data submitted to the Administrative Office by district court clerks are a reliable indicator of the basis for suit, as few as 25 civil statutes (including jurisdictional provisions) may account for as much as 80 percent of civil filings and civil judicial workload. See "Preliminary Findings: A Retrospective Analysis of the Effect of Legislation on the Workloads of the United States Courts," a work-in-progress by Fletcher Mangum and Frank Arnett of the Federal Judicial Center's Planning and Technology Division (hereinafter cited as "Retrospective Analysis"). Especially in conjunction with the expansive scope of

In absolute terms the numbers of federal question cases filed annually increased 1,434 percent between 1950 and 1990, from 6,775 cases per year to 103,938 cases per year. Indeed, by 1990 the number of federal question cases filed annually was double the number of all civil cases filed in 1961. Continuation of this forty-year trend would result in nearly 600,000 statutory federal question actions being filed annually by 2020.[21]

Although the number of diversity cases filed each year from 1950 to 1990 remained relatively constant as a proportion of all federal civil filings, in absolute terms the number of annual diversity filings rose dramatically. The overall size of the federal civil docket quadrupled during this period, and in order to go from a 24 percent share of that docket to a 26.2 percent share, diversity filings had to increase even more. Indeed, the 57,183 diversity cases filed in 1990 was 436 percent of the 13,124

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the new supplemental jurisdiction statute as applicable to federal question cases, 28 U.S.C. § 1367, newly-created federal statutory private rights of action are diverting to federal court substantial numbers of cases that would formerly have been brought in state forums.

[21]If the growth rate of federal question cases from 1950 to 1990 is extrapolated to the year 2020, the projected number of new federal question cases filed that year will be 593,008 (out of a total of 838,813 new civil cases). However, if one disregards the fairly stable period between 1950 and 1961, and projects out to 2020 the growth rate in federal question cases occuring just from 1961 to 1990, the figure is even more startling. The numbers of newly filed federal question cases increased by 782 percent between 1961 and 1990, representing a compound annual growth rate of 7.7 percent per year. Were this growth rate continued unabated, there would be over one million new federal question cases filed annually by 2020.

diversity cases filed in 1950.[22] Among new diversity cases, the proportion of ISP diversity cases fell from about 53 percent in 1970, the first year for which such data are available, to about 43 percent in 1990. But given the total of 52,557 new diversity cases filed in 1990 (out of 57,183 total diversity filings), the raw number of new ISP diversity cases remained quite large. In 1990 there were 22,762 new diversity cases filed by in-state plaintiffs.

Effective May 18, 1989, the jurisdictional amount in general diversity cases was raised by 400 percent.[23] This has resulted in a pronounced short-term decline in diversity filings, although experience with the previous 233 percent increase in the jurisdictional amount enacted in 1958 indicates that the effect of the increase will eventually be eroded by inflation.[24] The latest

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[22]The source of the data referred to in the balance of this section is an Administrative Office study entitled "Estimating the Impact of Eliminating Diversity Jurisdiction," by William T. Rule, Chief of the Analytical Studies Group of the Long Range Planning Office.

[23]The new amount was 500 percent of the old amount, but the percentage of increase, $40,000, was 400 percent of the former threshold of $10,000.

[24]The rate of erosion is a function of the amount of the increase and the rate of inflation. After enactment of the 1958 increase, diversity filings dropped from their 1958 peak of 25,709 to 17,340 in 1959 and reached a low of 17,024 in 1960. The rate of diversity filings then grew steadily, exceeding the 1958 peak by 1974, and reaching a new peak in 1988 of 68,224. The valley resulting from the 1988 increase is broader than that resulting from the 1958 increase, as would be expected from the greater magnitude of the increase and the low prevailing rate of inflation. Annual diversity filings fell only slightly in 1989, to 67,247, since the 1989 statistical year ended on June 30, 1989, and the new jurisdictional amount did not take effect until May 18, 1989. In 1990 the new jurisdictional amount had a major impact, with annual

data show that in-state plaintiffs filed 16,033 new diversity cases in 1992, which was about 35 percent of all new diversity cases (excluding remands, transfers, and other refilings) filed in 1992.

From 1950 to 1992 the overall rate of annual growth in new civil filings was 4.4 percent. The annual growth rate for federal question cases was 7.1 percent, for diversity cases 3.9 percent, and for federal government cases (adjusted to exclude a temporary spurt in 1981-1988 of cases to recover overpayment of veterans' benefits, student loan collection cases, and Social Security cases) 3.0 percent. If the time frame is narrowed and the temporary 1981-1988 surge of federal government benefits and collections cases is ignored, the adjusted overall growth rate for new civil filings from 1961 to 1992 is 5.0 percent per year. On this basis the forecasts indicate that the number of new civil filings will double every 14 years. By the year 2020 the projected number of annual new civil filings is 838,813, consisting of 88,703 federal government cases (10.6 percent), 157,102 diversity cases (18.7 percent),[25] and 593,008 federal question cases (70.7 percent).

B. Growth of the Criminal Docket

The growth in new criminal cases filed annually from 1950 to 1990 has been substantial, but far more modest than the comparable

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diversity filings dropping to 57,183. That decline has continued for the subsequent two years for which data are available. In 1991 there were 50,944 diversity filings, and in 1992 there were 47,981 diversity filings.

[25]This assumes that the jurisdictional amount remains at the present threshold of $50,000 and an annual inflation rate of 3.5 percent.

figures for the civil docket. In 1950 there were 36,383 criminal proceedings commenced in the federal courts compared to 46,530 in 1990. This constitutes an increase of only 27.8 percent during a period in which the population of the United States grew by 64.4 percent. This is consistent with the trend of the criminal docket since 1904. During the period from 1904 to 1990 in which population increased by over 200 percent and the civil docket increased by over 1,400 percent, the criminal docket increased by only 157 percent. After reaching record heights during prohibition -- 92,174 new criminal cases were filed in 1932, nearly double the number in 1990 -- the criminal docket dropped dramatically and has remained fairly stable ever since.[26]

The overall growth rate in criminal filings from 1950 to 1992 was only 0.6 percent per year, but this rate was depressed by a large number of highly localized immigration cases early in the period. When adjusted to exclude these cases, the trend rate for growth in new criminal filings is 1.3 percent per year. During the entire period, however, the growth rate for drug cases was 4.9 percent per year, and since 1980 has been 12.9 percent per year.

The caseload pressure of the criminal docket cannot be understood only in quantitative terms, however. There is abundant qualitative evidence that modern criminal cases tend to be more complex and time consuming than those filed in earlier years.

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[26]The source of these data is "Federal Court Caseloads Since 1950," supra note 18, with the exception of the 1950 versus 1990 population comparison, which is based on the national census figures for those years.

Pursuant to the Civil Justice Reform Act of 1990, each United States District Court commissioned an "advisory group" to study the causes and effects of excessive cost and delay in civil litigation in that court. Several of the advisory groups reported that a major cause of civil justice cost and delay in the federal courts was the added complexity of the criminal docket[27] resulting from rising numbers of federal prosecutions of narcotics and firearms violations that had traditionally been handled by state courts.[28]

In addition to creating new federal crimes, Congress has required that federal judges comply with strict sentencing guidelines after conviction. The Sentencing Reform Act of 1984[29] established a federal Sentencing Commission whose function was to draft a system of relatively narrow guidelines which the sentencing judge was to use in sentencing the convicted defendant. In effect since 1987, the sentencing guidelines are based on numerical values

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[27]See, e.g., Report of the Civil Justice Reform Act Advisory Group of the United States District Court for the Eastern District of California, November 21, 1991, Prof. John B. Oakley, Reporter; Report of the Eastern District of New York Advisory Group, October 22, 1991, Prof. Edward D. Cavanagh, Reporter.

[28]Subject to the previously noted qualification that the reliability of the source data has not yet been validated, see supra note 20, it appears that 25 criminal statutes account for approximately 85 percent of all criminal filings and almost 95 percent of judicial workload. The most notable sources of recent caseload growth are prosecutions involving the use of firearms under 18 U.S.C. §§ 922 and 924 and drug conspiracy cases under 18 U.S.C. § 846. See "Retrospective Analysis," supra note 20. The tentative finding of this study is that in 1992, conspiracy cases alone accounted for 28 percent of the time devoted by federal judges to the criminal docket.

[29]Act of October 12, 1984, P.L. 98-473.

attached to the gravity of the offense, as well as any aggravating or mitigating circumstances forseen by the Commission. While the actual impact of the guidelines is unclear, it appears that district courts are spending more time on sentencing matters because of the need to resolve factual disputes that could have a significant effect on the guidelines' range.[30] Moreover, the abolition of the parole system, and the concomitant increase in the responsibility of the federal courts to adjudicate supervised release violations, has markedly increased the time consumed by criminal cases as well.

Although it is difficult to marshal statistical evidence of qualitative changes in caseload, we have identified a number of objective indicators corroborative of the sense of the judiciary that the nature of the criminal caseload is changing in a resource-intensive way. The following discussion is based on a study of trends in the criminal docket between 1970 and 1992, prepared by the Statistics Division of the Administrative Office of the United States Courts.[31]

New criminal filings increased by 21 percent between 1970 and 1992. In 1972, however, criminal case filings reached a 40-year

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[30]See Civil Justice Reform Act Advisory Group of the Eastern District of California, Report of November 21, 1991, supra note 27, Appendix E-3 (analyzing effects of the Sentencing Reform Act).

[31]This study, "The Criminal Caseload: Increasing Burden on the District Courts?," was prepared at our request by David L. Cook, Chief of the Statistics Division of the Administrative Office. Consistent data permitting valid comparisons with subsequent years are generally unavailable for years prior to 1970.

high, so that in 1992 there were actually 14 percent fewer new criminal filings than in 1972, involving eight percent fewer defendants.[32] By virtue of the significant increases in the size of the federal judiciary during this 20-year period, the number of criminal cases per authorized judgeship decreased even more, from 118 per judgeship in 1972 to 62 per judgeship in 1992. But this apparent respite must be evaluated in light of the changing complexity of the criminal caseload per judge. In federal courts today, the primary source of caseload pressure on the criminal docket is the increase in drug prosecutions.[33]

A major source of the 1972 peak in criminal filings was selective service cases, which have since disappeared from the federal criminal docket. In 1972 drug filings were also on the way up, but consisted primarily of marijuana cases. From a 1972 level of about 7,000 drug cases, drug filings peaked in 1973 at 8,800, and had fallen by 1980 to only 3,130. During the ensuing 10 years, drug cases, now primarily involving cocaine, increased by 290 percent, to 12,226 in 1990. Between 1980 and 1990 the rate of increase in drug filings was almost five times the rate of increase in criminal filings overall. By 1992 drug filings had risen to

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[32]These figures exclude traffic cases, which were not included in the data collected by the Administrative Office until 1974-75. They are excluded in order to avoid distortion in comparisons of pre-1974 data with current data, and because they are handled almost exclusively by magistrate judges.

[33]For the entire period 1950 to 1992, the drug caseload grew at an annual rate of 4.9 percent per year. But since 1980 the growth of the drug caseload has been 12.9 percent a year, which entails a doubling in the number of drug cases every six years. "Federal Court Caseloads Since 1950," supra note 18.

12,512, nearly 80 percent more than in 1972. Drug cases now constitute 26.4 percent of all new criminal cases. Drug defendants, who accounted for only 18 percent of all criminal defendants charged in federal court in 1972, constituted 41 percent of new federal defendants in 1992. Thus the proportion of drug defendants among all federal defendants increased by 128 percent during the twenty years from 1972 to 1992.

The number of drug distribution cases rose by over 50 percent between 1972 and 1992, from 6,520 to 9,868. During the same period the number of drug possession cases fell by over 50 percent, from 1,561 to 1,002. These changes are particularly significant in light of a shift in emphasis from prosecution of marijuana offenses to prosecution of cocaine offenses,[34] as well as a sharp rise in the proportion of drug cases involving distribution as opposed to possession.[35] The burden of a drug-dominated criminal docket

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[34]The Federal Judicial Center is currently revising the time study used by the Administrative Office to determine weighted caseloads. The new time study tentatively shows that cocaine distribution cases take an average of 6 hours of judicial time per defendant and that cocaine possession cases take 1.5 hours per defendant, while marijuana distribution cases take 4 hours per defendant, and marijuana possession only .2 hour per defendant.

[35]In 1972, possession cases constituted 17 percent of all drug cases. In 1992, possession cases constituted only 8 percent of all drug cases. Drug distribution cases have a high ratio of defendants per case (1.8 in 1972, 2.1 in 1992) than possession cases (1.3 in 1972, 1.2 in 1992). In 1992 drug distribution cases accounted for 78 percent of all new drug cases, and 83 percent of all new drug case defendants.

Although the percentage of new criminal filings involving multiple defendants has remained fairly constant over the past twenty years, the shift in prosecutorial emphasis toward multiple-defendant cocaine distribution cases has compounded the diseconomies of scale of adjudicating multiple-defendant cases. The new Federal Judicial Center time study, see supra note 34,

involving multiple-defendant cocaine distribution cases is further increased by two phenomena common to all federal criminal cases: higher trial rates and higher conviction rates.

In 1972 criminal filings constituted 33 percent of all new cases filed in federal courts, and criminal trials constituted 40 percent of all cases tried in federal court. Due to the much higher rate of increase in new civil versus new criminal filings (reflecting in part the evaporation of selective service cases since 1972), in 1992 criminal cases constituted only 15 percent of all new cases filed in federal court. Yet in the face of this declining size of the criminal docket versus the civil docket, in 1992 criminal trials had risen to 47 percent of all trials held in federal court. Moreover, the percentage of criminal defendants convicted has simultaneously risen, from approximately 75 percent two decades ago to the 1992 figure of 85 percent. The impact on judicial workload of these higher rates of trial and conviction is compounded by the increased complexity of sentencing determinations under the sentencing guidelines, and the current system of supervised release monitored by the court rather than a parole board.[36]

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tentatively finds that while the average time per defendant in a multiple-defendant case is 347 minutes versus 178 minutes in a single-defendant case, for cocaine distribution cases the differential is 447 minutes per defendant in a multiple-defendant case versus 232 minutes per defendant in a single-defendant case.

[36]In the two years between June 1990 and June 1992, the number of convicted federal defendants under court-supervised release nearly quadrupled, from 5,011 to 19,362.

A final indicator of the qualitative increase in the burden of the federal criminal docket is the dramatic increase in the average length of criminal trials over the past 20 years, caused in part by the rising percentage of multiple-defendant drug distribution cases. In 1973, when 1972's peak number of new criminal filings moved through the trial system, there were 5,630 criminal jury trials conducted by federal courts. In 1992 the number of federal criminal jury trials was almost exactly the same: 5,632. However, the total number of criminal jury trial days in federal court in 1973 was roughly 16,000. To try the same number of criminal cases in federal court in 1992 took roughly 25,000 days, an increase of 56 percent."[37]

The forecast of the size of the criminal docket in 2020 confirms the dominant role of drug cases (if current trends continue). By 2020 the number of new criminal cases filed annually in federal court is projected to be 129,497. Over two-thirds of these cases (89,821, or 69.3 percent) are forecast to be drug cases."[38]

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[37]An additional indicator that the modern criminal docket consists of far more "big cases" than two decades ago is the percentage of lengthy trials. The number of criminal trials lasting 6-20 days increased by 118 percent between 1973 and 1992, and the number of criminal trials lasting over 20 days tripled during the same period. Reflecting the trend to the big case, the number of federal prosecutors per federal judicial officer increased by 120 percent between 1976 and 1992, from 1.5 to 3.3.

[38]"Federal Court Caseloads Since 1950," supra note 18.

C. Growth of the Appellate Docket

Since 1904 the rate of new cases filed annually in the courts of appeals has increased 3,868 percent, 19 times greater than the growth in national population during the same period.[39] Although much of this percentage increase occurred prior to 1950, the number of appeals filed per year was still relatively low in absolute terms. There were 2,830 appeals filed in the federal courts of appeals in 1950. Over the next 40 years the annual rate of appellate filings grew a further 1,345 percent, producing 40,898 new cases filed in the federal courts of appeals in 1990.

The rate of growth of criminal appeals has been greater than that of civil appeals, not surprisingly given the provision of appointed counsel to indigent defendants. Since 1950, the percentage of criminal appeals in the overall appellate docket more than doubled, from 11 percent in 1950 to 24 percent in 1992. Overall, the 1950-1992 annual growth rate of criminal appeals was 8.7 percent, the annual growth rate of civil appeals was 7.5 percent, and the net annual growth rate in all appeals was 7.7 percent, a figure that remained remarkably steady and stable throughout that 42-year period.[40]

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[39]Unless otherwise noted, the source of the data referred to in this section is "Federal Court Caseloads Since 1950," supra note 18.

[40]A 7.7 percent rate of annual growth leads to a doubling in size roughly every nine years.

Diversity cases account for a disproportionately small percentage of all appeals.[41] In 1991, the last year for which such data are available, there were 4,088 diversity appeals (10.9 percent) out of a total of 37,410 appeals. The total number of appeals in civil cases filed in 1991 was 27,461, of which diversity appeals constituted only 14.8 percent, despite the fact that diversity cases constituted a consistent one-quarter of the federal civil docket for the forty previous years. In 1991 there were 9,949 criminal appeals (26.6 percent of all appeals) and 16,668 appeals in federal question cases (44.6 percent of all appeals, 60.7 percent of all civil appeals). No information is available on ISP cases as a percentage of all diversity cases in which appeals are filed.

According to the forecast, if current trends continue the number of appeals filed in the year 2020 will be 428,203, consisting of 105,085 criminal appeals (24.5 percent) and 323,117 civil appeals.

IV. THE CORE FUNCTIONS OF THE FEDERAL COURTS

The caseload data and trend forecasts discussed in Part III make clear that these are challenging times for the federal judiciary. If present trends continue, the civil caseload will grow at a rate that will double itself every 14 years, and in the 28 years between 1992 and 2020 the compounded effect of that

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[41]The source of the data in this paragraph is 1991 Annual Report, supra note 14, at 183 (Table B-7).

doubling and redoubling will raise the annual number of civil cases commenced from roughly 226,000 per year to nearly 840,000 per year. And, if the present trends continue, the criminal caseload will grow more slowly, from present filings of about 47,000 cases per year to about 130,000 cases per year, but these cases will consist of ever higher proportions of time-consuming drug cases: 69.4 percent of the criminal docket in 2020, versus 26.4 percent at present. The appellate caseload will have risen a further 930 percent, from about 46,000 appeals per year to nearly 430,000.

There are several responses to the challenge presented by these sharply rising caseloads: more judges, fewer cases, or increased administrative efficiency. Although the first two choices are constitutionally committed to Congress, it may be appropriate for the judiciary to comment about the effect of caseload growth on the one structural, indeed overarching, constitutional value that has indisputably been the special responsibility of the judiciary since Marbury v. Madison:[42] the separation of powers.

The Madisonian ideal of a system of checks and balances demands that each of the three branches of the federal government coexist as an actor of equal dignity in the fulfillment of distinct constitutional roles. It is axiomatic to our political theory that, subject to the secondary powers of each branch to "check" the operations of its peers, the essential "balance" is created by allocating to the legislature the primary power and duty to make

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[42]5 U.S. (1 Cranch) 137 (1803).

or amend the law, to the executive the primary power and duty to enforce the law, and to the judiciary the primary power and duty to interpret the law.

This arrangement of separated but interdependent responsibilities is fundamental to our system of coexistent democratic power and constitutional liberty. If caseload pressure interferes with the federal judiciary's performance of its fundamental responsibilities, the integrity of the system as a whole may be threatened, at incalculable cost.[43]

The proper scope of federal jurisdiction is, of course, a question of considerable political and academic controversy, most of which is beyond the scope of this Report. Article III constitutionally establishes objectively identifiable outer limits on federal jurisdiction. "But these are extremely permissive, and no one contends that federal jurisdiction should extend this far."[44] Pursuant to the "Madisonian compromise," the question of just how far from the frontiers of Article III the bounds of federal jurisdiction should remain was left by the Framers to the practical and political judgment of Congress.[45]

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[43]This discussion draws heavily on research conducted for the Federal Courts Study Committee. See Erwin Chemerinsky & Larry Kramer, Defining the Role of the Federal Courts, 1990 B.Y.U. L. Rev. 67.

[44]Chemerinsky & Kramer, supra note 43, at 75.

[45]Wright on Federal Courts, supra note 3, § 1, at 2. The result of the Madisonian compromise -- occasioned by the Framers' inability themselves to agree on the proper scope of federal jurisdiction -- is essentially to make the lower federal courts a resource to be used as Congress deems necessary. Chemerinsky &

Congressional decisions relating to the exercise of federal judicial power reflect important political choices implicating significant historical consequences. No definitive yet apolitical statement of the "proper role" of the federal courts is possible, and none will be attempted here. Nevertheless, it is possible to identify a number of areas in which the jurisdiction of the federal courts is largely uncontroversial. From these areas it is possible to construct a "minimal model of federal jurisdiction"[46] that describes the core functions of the federal courts.

(1) The federal courts enforce the institutional arrangements and individual rights provided by the United States Constitution. Among the least controversial areas of federal jurisdiction are questions concerning the structure of the federal government and federalism. It has become indisputable that, outside of a narrow realm of "political questions,"[47] it is the responsibility of the federal courts to decide how power is to be distributed among the constituent elements of the federal government, and between the federal government and the states. Additionally, it is agreed that

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Kramer, supra note 43, at 75. See also 4 The Founder's Constitution 131-212 (Philip Kurland & Ralph Lerner, eds., 1987).

[46]Chemerinsky & Kramer, supra note 43, at 77.

[47]See Erwin Chemerinsky, Federal Jurisdiction § 2.6, at 124-145 (1989).

the federal courts are an appropriate forum for the adjudication of the Constitution's guarantees of individual rights.[48]

(2) The federal courts protect the interests of the federal government as a sovereign. The power of the federal courts to hear suits by and against the federal government is a traditional prerogative of a sovereign state.

(3) The federal courts resolve disputes between states. The uncontroversial aspect of this form of federal jurisdiction is the Supreme Court's original and exclusive jurisdiction over suits

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[48]"This area of agreement does not extend to whether state courts are an acceptable alternative forum for resolution of claims to constitutionally protected rights. However, the issue of state court "parity" with federal courts as forums for adjudication of constitutional claims, see Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 U.C.L.A. L. Rev. 233 (1988); Michael E. Solimine & James L. Walker, Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity, 10 Hastings Const. L.Q. 213 (1983); Burt Neuborne, Toward Procedural Parity in Constitutional Litigation, 22 Wm. & Mary L. Rev. 725 (1981), does not entail controversy about the appropriateness of the federal courts as such forums.

> The parity debate is ultimately unresolvable because parity is an empirical question and we lack a meaningful standard by which to judge decisions in competing judicial systems.
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> [However, it] is not necessary to resolve [the parity debate] for present purposes. After all, no one contends that federal courts are an inappropriate forum in which to adjudicate federal constitutional claims. The parity debate may be relevant in resolving technical issues such as the precise scope of abstention or habeas corpus. It may also be relevant in considering whether federal jurisdiction should be exclusive. But no one disputes the propriety of federal jurisdiction over federal constitutional claims.

Chemerisky & Kramer, supra note 43, at 79-80 (footnotes omitted).

between two states.[49] There is intense controversy, of course, whether interstate disputes between private parties implicate the core functions of federal courts sufficiently to justify retention of general diversity jurisdiction.

(4) The federal courts ensure uniform interpretation and application of federal statutes and treaties. From 1789 to 1875 this function was served primarily by the Supreme Court's power to review state court judgments grounded in part on federal law,[50] but its status as a core function of the federal courts has been indisputable since the 1875 enactment of general "federal question" jurisdiction.[51] Some types of cases arising under federal law --

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[49]Without a neutral tribunal in which to try their disputes, Professors Chemerinsky and Kramer explain, "state governments might retaliate in ways that threaten the cohesiveness of the union." Chemerisky & Kramer, supra note 43, at 82. Judicial resolution of such disputes is therefore imperative, and federal jurisdiction exists without need of consent of the party-states beyond that implicit in their initial entry into the Union. Wright on Federal Courts, supra note 3, § 109, at 766. The constitutional grant of original jurisdiction to the Supreme Court is generally understood to be self-executing, that is, operative without need of statutory implementation. Id. at 764. The quintessentially "core" status of federal jurisdiction over disputes between states has been underscored, however, by the statutory designation of this jurisdiction has exclusive to the Supreme Court. 28 U.S.C. § 1251.

[50]See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 386-387 (1821). This power was originally granted to the Supreme Court under § 25 of the Judiciary Act of 1789, and is presently conferred by 28 U.S.C. § 1257.

[51]Act of March 30, 1875, presently codified as 28 U.S.C. § 1331. See Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 826 (1986) (Brennan, J., dissenting). Because the federal Constitution, statutes and treaties apply to the entire nation, they should have an identical meaning in all parts of the country. See Chemerinsky & Kramer, supra note 43, at 84. The core status of general federal question jurisdiction was most recently

for example, copyright and patent cases,[52] admiralty and marine cases,[53] and bankruptcy cases[54] -- deal with federal interests of such strength that Congress has made the jurisdiction of the federal courts exclusive of the otherwise presumptively concurrent jurisdiction of state courts in federal question cases.[55]

(5) The federal courts develop federal common law. Although "federal general common law" was disavowed in Erie R.R. Co. v. Tompkins[56], which requires federal courts to defer to state law where Congress has asserted no substantive federal interest, an important if more limited form of federal common law remains a vital part of national law. Where federal statutory policy reveals a "federalizing principle" the decision of Congress to supersede state law may generate a penumbra of federal common law between and

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underscored by congressional repeal in 1980 of the last vestiges of a required amount in controversy. See Wright on Federal Courts, supra note 3, § 32, at 177.

[52]28 U.S.C. § 1338.

[53]28 U.S.C. § 1333.

[54]28 U.S.C. § 1334.

[55]The presumption in favor of concurrent state jurisdiction was recently reviewed and reaffirmed in Yellow Freight System v. Donnelly, 494 U.S. 820 (1990).

[56]304 U.S. 64 (1938).

beyond the express text of the statute.[37] This federal common law has become increasingly important in areas such as antitrust law and labor law, including the Employee Retirement Income Security Act of 1974 (ERISA).[38]

(6) Finally, federal courts have the core function of hearing appeals from rulings on federal law by first-tier decisionmakers. In part the appellate function serves to maintain internal hierarchical control of the lower federal courts. But equally important is the role of these lower federal courts in themselves reviewing decisions reached in the first instance by officials outside the federal judicial system who are charged with the determination and application of federal law.[39] While appeal is no more constitutionally guaranteed than the rest of the jurisdiction of the lower federal courts, it is unrivalled in practical importance. Appeals function to preserve institutional coherence and coordination, as well as to protect individual

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[37]See Grant Gilmore, The Ages of American Law 93-95 (1977).

[38]29 U.S.C. §§ 1001 et seq.

[39]Part of the core function of providing means to appeal determinations of federal law is provision for federal judicial review of decisions by federal administrative agencies, and review of state court criminal judgments by writ of habeas corpus. The latter category, although controversial in the details of its implementation and its relationship to principles of finality, especially with respect to predicate facts, remains far from a peripheral function of federal courts given the significant liberty interests likely to be at stake, the complexity of federal constitutional rules of criminal procedure, and the unsuitability of the Supreme Court's certiorari docket for correcting mistakes of federal law that have the gravest personal consequences but lack national significance.

liberty and autonomy. Indeed, it is difficult to conceive of a system of rules that, absent provision for appeal, could be classified as government of law rather than government by totalitarian decree.[60]

V. BENEFITS OF REPEAL OF ISP DIVERSITY JURISDICTION

The six core functions of the federal judiciary identified in Part IV -- construction and application of the federal Constitution; adjudication of claims by and against the federal government in its sovereign capacity; resolution of interstate disputes involving important federal interests; interpretation and application of federal statutes; implementation of federal policy through development of federal common law; and federal review of the administration of federal law by officials with initial responsibility for resolving disputes -- together form the essential mission of the federal judiciary. An inability to perform any one of these six core functions would jeopardize the stability of the balance of power among the branches of the federal government, between the federal government and the states, and among the states. The danger of the mounting challenge of caseload

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[60]At least four fundamental values of the rule of law are served by a system of appeal. Appeals are a mechanism for correcting mistakes by inferior decisionmakers, for reviewing the institutional impact of a particular decision on other pending or future cases, for fostering a sense of participation by the parties in the process of determining their legal rights and obligations, and for promoting the public's sense of the legitimacy of that process. See John B. Oakley, The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties, 1991 B.Y.U. L. Rev. 859, 869-71.

pressure discussed in Part III must be judged against the real risk that, sooner or later, overloaded federal courts will become unable to perform these six core functions with the distinction and detachment that has made American constitutional democracy the envy of the world.

Our review of caseload trends in Part III established that general diversity jurisdiction, although an important contributing factor, is not the principal factor in the growth of federal court caseloads. On the civil side, caseload growth has been driven primarily by growth in federal question litigation. On the criminal side, caseload pressure has resulted not from growth in the sheer number of cases, but from the changing character and increased complexity of the criminal docket. In the wake of congressional and executive policy decisions to reform the sentencing process and to use federal firearms and conspiracy laws to bring into federal court large numbers of defendants who previously would have been subjected to state prosecution, more and more judicial time must be devoted to the administration of the criminal docket, leaving less time available to process an ever larger number of civil cases.

Whatever else may be said about the changing nature of federal question litigation, for the reasons outlined in Parts I and II, the adjudication of ISP diversity cases surely does not fall within the core functions of the federal judiciary.

The question remains whether ISP repeal would deliver a sufficient reduction in federal court caseloads to justify serious

effort to achieve this reform. Many interests have historically resisted any substantial change in the scope of diversity jurisdiction. These objections, however, can be reduced in part by focusing on ISP repeal alone, and by taking care to differentiate the arguments for ISP repeal from the more general, and more controversial, issue of the federal interests served by general diversity jurisdiction. Undoubtedly the benefits of ISP repeal would make this effort worthwhile -- avoiding unnecessary strain of the federal system by reducing the need to increase the number of federal judges, and saving well over one-half billion dollars.[61]

In Part III we determined that approximately 35 percent of all new diversity filings -- 16,033 cases in 1992 -- were filed by in-state plaintiffs. The net reduction in the diversity caseload resulting from repeal solely of ISP diversity jurisdiction would probably be somewhat less than 35 percent, however -- on the order of 18 percent. There are two reasons for this conservative estimate of the impact of repeal of ISP jurisdiction.

First, if diversity exists a plaintiff who would have invoked ISP jurisdiction prior to its repeal will be foreclosed from

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[61]It is estimated that the present value of the cost savings that would result from repeal of ISP diversity jurisdiction to be $696 million. This estimate is based on a calculation of $1.3 billion as the present value of the cost of the new judgeships that would be required in the future on account of annual filings of diversity cases by in-state plaintiffs, reduced to $671 million by the assumption (discussed below) that one-half of such cases will still be litigated in federal court because of removal by the defendant or the plaintiff's filing suit in an out-of-state federal court. See "Estimating the Impact of Eliminating Diversity Jurisdiction," supra note 22.

invoking federal subject-matter jurisdiction only in federal district courts located in that plaintiff's state(s) of citizenship. Thus the repeal would operate functionally, if not formally, only as a venue restriction.[62] The traditional venue option of a diversity plaintiff to file in the plaintiff's home state under former 28 U.S.C. § 1391(a)(1)[63] has already been eliminated by the 1990 venue amendments, but at the same time transactional venue under new 28 U.S.C. § 1391(a)(2) was broadened in 1988 to permit venue in any of the possibly numerous districts in which "a substantial part of the events or omissions giving rise to the claim occurred." The residence of the defendant remains a venue option as well under § 1391(a)(1), as amended in 1990, and an independent 1988 amendment to the venue statutes virtually eliminated venue as a constraint in suits against corporate

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[62]See Anthony Partridge, The Budgetary Impact of Possible Changes in Diversity Jurisdiction 34 (Federal Judicial Center 1988).

[63]This venue option existed continuously from 1789 until 1990. It was widely thought to be an inexplicable anomaly that Congress would provide a broader range of venue choices in diversity actions than federal question actions, venue in the latter actions being confined under former 28 U.S.C. § 1391(b) either to the district(s) of defendant's residence or, after 1966, to the single district in which the claim "arose," with the district of plaintiff's residence never being an available venue option in litigation under the general federal question statute, 28 U.S.C. § 1331. The "protection of contract" thesis offered above as the rationale for permitting ISP diversity jurisdiction from the inception of the federal courts provides an explanation of why Congress historically removed not only jurisdictional but venue obstacles that might have impeded the congressional goal of opening the federal courts of the eighteenth century to plaintiffs whenever complete diversity existed.

defendants, who are deemed to reside in any district in which they are subject to personal jurisdiction. 28 U.S.C. § 1391(c), as amended. Thus current law makes it quite easy for a determined plaintiff who has been barred from access to diversity jurisdiction in a suit filed in the plaintiff's home state, to find a convenient and not-too-distant federal district in which diversity jurisdiction may be invoked without plaintiff's running afoul of the forbidden status of an ISP.

Second, it follows from the "complete diversity" component of general diversity jurisdiction that the defendant in any action that would have been filed in federal court but for ISP repeal will be a non-citizen of the state in which the plaintiff is a citizen. If indeed the former ISP suit is not filed in a federal district court located elsewhere, and is filed instead in the court system of the plaintiff's home state, there will in every such action be an absolute right to removal by the defendant.

It is inherently speculative to attempt to quantify the probable percentage of frustrated ISP suits that will become federal diversity suits by redirection, either through the plaintiff's filing of suit out-of-state, or through the defendant's removal. Doubtless the percentage will be substantial. But three pragmatic considerations counsel that the impact of ISP repeal in reducing the diversity caseload would not be so inconsequential as to make ISP repeal not worth the effort.

First, the incentive for a plaintiff to go out-of-state in order to invoke the diversity jurisdiction that would have been

invoked in-state but for ISP repeal is subject to two serious constraints. The first constraint is the likely concern that, even if denied whatever procedural advantage would induce invocation of ISP jurisdiction were it available, the advantages enjoyed by the plaintiff under the substantive law of plaintiff's home state outweigh whatever disadvantage inheres in docket congestion or other local procedural disadvantage suffered by the plaintiff if suit is filed in the court system of the plaintiff's home state. As a practical matter plaintiff's counsel is likely to be more familiar and confident about the substantive posture of plaintiff's state under local substantive law, including local choice of law rules, than under the substantive and choice of law rules of some other state with which counsel is less familiar. This likely conservatism in electing to go out-of-state is compounded by a second constraint: the reluctance of counsel, especially in recessionary times, either to suffer the added cost (and for contingent fee lawyers, the added risk) of litigating out-of-state, or to reduce the potential income to be earned in the case by associating out-of-state counsel to conduct or assist in the litigation in an out-of-state federal district court.[44] These

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[44]Accord, ALI Study, supra note 3, Appendix B, at 469:

> It should be noted that in some of the excluded cases the in-state plaintiff might want a federal forum badly enough to leave home and sue in the district where the defendant resides (or in some other district where sufficient of the events giving rise to the claim occurred and defendant is subject to process). But the plaintiff's counsel is not likely to advise this course of action, with the attendant division of responsibility and fees with correspondent counsel, particularly if the home state is the obviously convenient

constraints exert particular force to keep litigation from being filed out-of-state when the claim is a personal injury claim, and such claims make up a high proportion of past ISP filings.[65]

Second, when these factors do operate to constrain a plaintiff to file a diversity suit in the state courts of plaintiff's home state, flight to federal court by the out-of-state defendant is not a foregone conclusion. By and large delay in trial works to the advantage of defendants, at least in simple cases in which discovery and other pre-trial costs are relatively finite and delay entails simply a longer wait in the queue at little additional cost. Although the data are not entirely consistent, they generally support the hypothesis that plaintiffs will seek the forum offering speedier trial, and (all else being equal) defendants will prefer the forum offering greater delay in getting to trial.[66] In most states there is lesser delay in getting a trial

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location for the trial because the events in suit occurred there.

[65]According to an analysis of 1987 diversity filings, the overall mix of types of claim in diversity cases was 49 percent contract cases, 45 percent tort cases, and six percent property cases. But for ISP cases alone the mix was far different, with a marked preponderance of tort cases: 67 percent tort cases, 31 percent contract cases, and (roughly) two percent property cases. Victor Eugene Flango & Craig Boersema, Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads, 15 U. Drayton L. Rev. 405, 418, 427-29 & Table 6.

[66]In addition to Neal Miller, An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction, 41 Amer. U.L. Rev. 369 (1992), see the facts recited in Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 339-41 & n. 3 (1976). In Thermtron Judge Hermansdorfer of the United States District Court for the Eastern District of Kentucky

date in the federal courts than in the state courts, although local conditions may reverse the situation in some federal districts, particularly those that have major drug-smuggling caseloads.

Third, to the extent that former ISP diversity cases might come to federal court via the alternative routes of out-of-state filing or removal and thus reduce the practical impact on the diversity docket of ISP repeal, the potential for the affected parties to mitigate the effect of ISP repeal enhances the attractiveness of ISP repeal as a controlled experiment that Congress can undertake with scant political cost. The unknown degree to which the effects of ISP repeal may be mitigated because the keys to the federal courthouse door remain essentially in the litigants' pocket can be turned into a powerful argument that no rational reason remains for Congress to refuse ISP repeal.

VI. PROPOSED LEGISLATION

The historic justification for ISP jurisdiction has entirely evaporated. If ISP repeal is "unbundled" from the more controversial issue of repeal of general diversity jurisdiction, Congress is presented with an attractive reform. The general antipathy of the organized bar to alteration in the fundamentals

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attempted to remand to state court a diversity case removed, in the judge's opinion, solely to give the defendant the benefit of interminable delay in getting to trial. In addition to a sizable criminal docket, Judge Hermansdorfer was confronted by a civil docket that was severely clogged with "Black Lung" and Social Security cases which were statutorily entitled to priority of trial over private civil actions.

of diversity jurisdiction can be overcome with respect to ISP repeal, because determined counsel are left free to invoke federal jurisdiction by removal or out-of-state filing of suit. Yet by repealing ISP diversity jurisdiction, Congress can heed the pleas of federal judges for caseload relief that will help to preserve their ability to perform their core functions.

We accordingly propose that 28 U.S.C. § 1332 be amended by adding the following new subsection (e):

> (e) The original jurisdiction of the district courts otherwise conferred by this section may not be invoked if any plaintiff joined in the complaint is a citizen of the State in which is located the district court in which the suit is filed. For purposes of this subsection only, the District of Wyoming shall be deemed located solely within the State of Wyoming. This subsection does not apply to or limit the applicability of the right of removal under section 1441(a) of an action that would otherwise be within the original jurisdiction of the district courts.

The first sentence of our proposed § 1332(e) repeals ISP diversity jurisdiction. Its language is functionally parallel to the prohibition of in-state defendant diversity removal jurisdiction presently set forth in the second sentence of 28 U,S.C. § 1441(b).

The second sentence of our proposed § 1332(e) is a technical provision required by the oddity that the District of Wyoming is the only federal district whose territory is not contiguous with the boundaries of a single state. The District of Wyoming includes the entirety of Yellowstone National Park, parts of which are within the states of Idaho and Montana. Under the terms of the second sentence of our proposed § 1332(e), a diversity suit brought

by a citizen of Idaho or Montana in the District of Wyoming would not be considered a suit by an in-state plaintiff, and would not be affected by our proposed § 1332(e).

The third sentence of our proposed § 1332(e) makes clear that the enactment of the new subsection has no effect on the right of removal under existing law of defendants who are sued by a diverse plaintiff in the courts of the plaintiff's home state.

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